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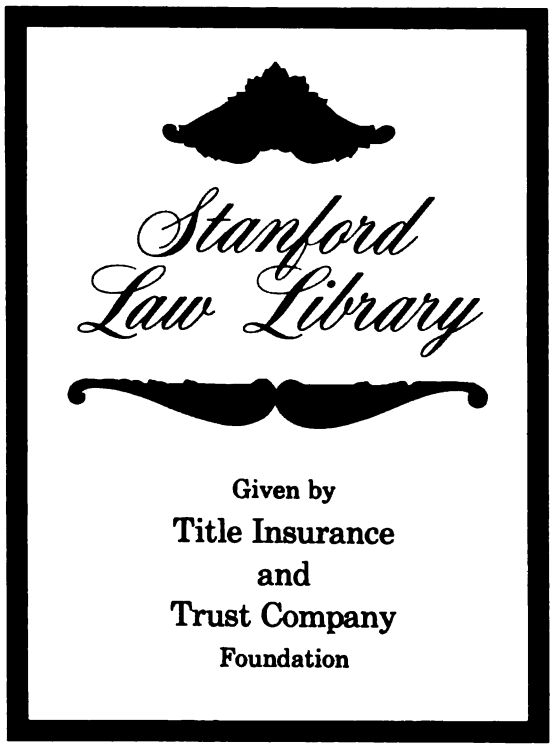

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WITH NOTES AND RULES OF COURT.

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ARTHUR EUSTACE RUSSELL, M.A.,

BOTH OF LINCOLN'S INN, BARRISTERS.

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PREFACE TO THE NINTH EDITION.

In the death of the late Mr. Wilfred Brinton, not only his personal friends and those who were associated with him in the editorship of this book, but the whole profession have sustained a loss, which is widely felt. The success to which he had already attained in his career was due as well to his charm of manner, as to his great industry and the scrupulous care he bestowed on all his work. He was one of the editors appointed by Mr. Wolstenholme to prepare the sixth, seventh, and eighth editions of this book, and there is no question that to Mr. Brinton a very large share in the success of those editions was due.

Mr. Wolstenholme, after an exceptionally useful and brilliant career, has at length retired from practice to seek a well-earned rest; and it is with deep regret that the editors have to announce that in the preparation of the ninth edition of this book they have not had his invaluable co-operation; his failing eyesight has not permitted of his undertaking editorial work during the past year.

It is hoped, however, that the present edition will be found worthy, in some degree, of the distinguished name with which this book has always been and always will be associated.

Since the publication of the eighth edition in April, 1899, the Land Charges Act, 1900, has been passed. But Parliament, in the main, seems to have been unable to find time to continue the amendment of the law relating to land. The present edition discloses many points on which the law might be usefully amended; and no one will doubt that, unless a consolidating and amending Land Transfer Act is passed within a reasonable time, the system of registration of title will fall into permanent disrepute.

The editors desire to thank Mr. A. Turnour Murray for much valuable assistance. They will be grateful for any suggestions which may be useful in the preparation of a subsequent edition.

June, 1905.

Arthur J. Phillips
Glencairn
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ABBREVIATIONS.

C. A.	*means* ..	The Conveyancing and Law of Property Act, 1881.
C. A., 1882 ..	„ ..	The Conveyancing Act, 1882.
C. A., 1892 ..	„ ..	The Conveyancing and Law of Property Act, 1892.
C. L. P. A. ..	„ ..	The Common Law Procedure Act, 1852.
C. L. P. A., 1860	„ ..	The Common Law Procedure Act, 1860.
L. T. A. ..	„ ..	The Land Transfer Act, 1875.
L. T. A., 1897	„ ..	The Land Transfer Act, 1897.
L. T. R. ..	„ ..	The Land Transfer Rules, 1898.
M. W. P. A.	„ ..	The Married Women's Property Act, 1882.
M. W. P. A., 1884	„ ..	The Married Women's Property Act, 1884.
M. W. P. A., 1893	„ ..	The Married Women's Property Act, 1893.
R. S. C. ..	„ ..	Rules of Supreme Court.
S. E. A. ..	„ ..	The Settled Estates Act, 1877.
S. L. A. ..	„ ..	The Settled Land Act, 1882.
S. L. A., 1884	„ ..	The Settled Land Act, 1884.
S. L. A., 1887	„ ..	The Settled Land Acts (Amendment) Act, 1887.
S. L. A., 1889	„ ..	The Settled Land Act, 1889.
S. L. A., 1890	„ ..	The Settled Land Act, 1890.
T. A., 1850 ..	„ ..	The Trustee Act, 1850.
T. A., 1852	„ ..	The Trustee Act, 1852.
T. A., 1888	„ ..	The Trustee Act, 1888.
T. A., 1889	„ ..	The Trust Investment Act, 1889.
T. A. ..	„ ..	The Trustee Act, 1893.
T. A., 1894	„ ..	The Trustee Act (1893) Amendment Act, 1894.
V. & P. A. ..	„ ..	The Vendor and Purchaser Act, 1874.

PART I.

VENDOR AND PURCHASER

AND

CONVEYANCING ACTS.

CHAPTER I.

GENERAL EFFECT ON TITLES OF THE VENDOR AND PURCHASER ACT, 1874, THE CONVEYANCING ACTS, 1881, 1882, AND THE TRUSTEE ACT, 1893.

Effect of V. & P.A., C.A., C.A., 1882, and T.A. on form and contents of documents.

THE following is a short statement of the manner in which the V. & P. A., the C. A., the C. A., 1882, and the T. A. affect the form and contents of various documents. (*a*)

Contracts.

(1.) Contracts for sale need not contain conditions as regards title and evidence of title except in special cases, as where the title is less than forty years, or where deeds abstracted cannot be produced, &c.: C. A., s. 3. An open contract may be safely made in case of an ordinarily good forty years' title, but it is advisable in all cases to state the date of commencement (see note to C. A., s. 3 (3)), and it is necessary to state it in the following cases:—

(*a*) Advowsons or reversionary interests (Dart, 7th ed., 329).

(*a*) See the meaning of abbreviations stated at the end of the Table of Cases, *sup.*

(*b*) Tithes or other property derived from the Crown where evidence of the Crown grant is to be negatived.

(*c*) Where the document first abstracted is a will and evidence of seisin is to be precluded: *Parr* v. *Lovegrove*, 4 Drew, 170.

(*d*) Where the document first abstracted is a settlement in pursuance of articles for a settlement, or a conveyance under a trust for sale, or the bar of an entail, or otherwise derives its effect from some prior instrument, except where it exercises a power: C. A., s. 3 (3).

Where it is stipulated that the abstract should commence with a particular deed less than forty years old, the nature of the deed should be clearly stated: *Re Marsh & Earl Granville*, 24 Ch. D. 11, at pp. 22, 24–5, and see also 43 Sol. J. 638. The safest course is always to fix the date of commencement, and to state the nature of the instrument with which the title commences; see n. to C. A., s. 3 (3). A good commencement helps to satisfy a purchaser.

Abstracts.

(2.) Subject as above abstracts of title commence—

(*a*) As to freeholds with a document at least forty years old: V. & P. A., s. 1.

(*b*) As to leaseholds for years with the lease or underlease: V. & P. A., s. 2, r. 1, and C. A., s. 3 (1); (that subsequent dealings over forty years old may be omitted, see *Williams* v. *Spargo*, W. N., 1893, 100).

(*c*) As to the freehold interest in enfranchised copyholds or customary freeholds with the deed of enfranchisement: C. A., s. 3 (2).

Seisin of testator.

But where the abstract commences with a will no alteration in the practice is made; consequently evidence of seisin may or may not be required, according to circumstances, and a clause preventing any requisition on this point may still be necessary.

Leaseholds.

(*d*) A lease or underlease is to be deemed *primâ facie* good, the last receipt for rent being

evidence of performance of covenants, and, in case of an underlease, also of payment of rent due under, and of performance of covenants in the superior lease, up to the date of actual completion of the purchase: C. A., s. 3 (4), (5); but a special condition is necessary where there is a peppercorn rent or a rent which is not a money rent: *Re Moody & Yates*, 28 Ch. D. 661, 30 *ib.*, 344.

(3.) Recitals — Recitals.

(*a*) Of facts in documents, as to *land or hereditaments*, twenty years old are evidence: V. & P. A., s. 2, r. 2.

(*b*) Of documents, as to *any property*, dated prior to the legal or stipulated time for commencement of the abstract are to be taken as correct, and production is not to be required: C. A., s. 3 (3).

(4.) Expenses — Expenses.

Of evidence required in support of the abstract and not in the vendor's possession are thrown on the purchaser: C. A., s. 3 (6).

(5.) In documents after 1881 there need be — What clauses, &c., to be omitted in documents.

(*a*) No general words: C. A., s. 6

(*b*) No all estate clause: C. A., s. 63.

(*c*) No special directions as to the mode of sale in a trust or power for sale, but only the words "Upon trust to sell" or "With power of sale," as the case may be: T. A., s. 13.

(*d*) No receipt clause: C. A., s. 22; T. A., s. 20.

(*e*) No mortgage joint account clause: C. A., s. 61.

(*f*) No power to survivors or survivor of several executors or trustees to do any act: T. A., s. 22; nor, except for purposes of copyhold or customary land, to "assigns." New trustees duly appointed have all the powers of the original trustees; T. A., s. 10 (3), & s. 37; and, except in the case of copyhold or customary land, there can now be no assign by devise of

a trust estate. Powers, except for purposes of copyhold or customary land, may be given simply to trustees, their executors or administrators.

(*g*) No mention either of heirs, executors, administrators, or assigns, whether of covenantor or covenantee, obligor or obligee, nor of the survivors or survivor of several covenantees or obligees, nor of the heirs, executors, or administrators of the survivor, nor of their or his assigns, need be made in covenants or bonds: C. A., ss. 58, 59, 60; except where a restrictive (*a*) covenant is intended to be made binding so far as the law allows on the land, and then the assigns of the covenantor should be mentioned.

(*h*) No particular technical operative word is required to pass a freehold: C. A., s. 49.

(*i*) No necessity for the word "heirs," "heirs of the body," &c., to create an estate of inheritance. But on this point there is still a distinction between a deed and a will. In a deed the estate to be limited must still be described accurately as "fee simple," "in tail," &c., or as before the C. A., and cannot be created, as in a will, by informal expression: C. A., s. 51; and see *Re Ethel & Mitchell*, 1901, 1 Ch. 945.

(*k*) No multiplication of receipt clauses for consideration. One receipt in the body of the deed or indorsed is sufficient: C. A., ss. 54, 55.

(*l*) No power to executors, administrators, or trustees to compound or compromise: T. A., s. 21.

(*m*) No remedy for the recovery of rent-charges: C. A., s. 44.

(*n*) No powers for the receipt or application of

(*a*) Whether any other covenant can be made binding on the land see *London and S. W. Railway Company* v. *Gomm*, 20 Ch. D. 562, and note to C. A., s. 58, *inf.*

income, or the accumulation of surplus income, during minority: C. A., ss. 42, 43. (*a*)

(6.) Covenants for title are not required, but by stating the character in which a person conveys the proper covenant by him is incorporated: C. A., s. 7. Under this s., however, a conveyance "as real representative" (L. T. A., 1897, Part I.) implies no covenant. **Covenants for title.**

(7.) A covenant for production of deeds is no longer required. A mere acknowledgment as defined by the Act gives the proper title to production and delivery of copies, and a mere undertaking gives the proper remedy in case of destruction or damage: C. A., s. 9. **Covenant to produce deeds.**

(8.) In a mortgage by *deed* there are supplied:— **Powers conferred on mortgagors and mortgagees.**

(*a*) Power for mortgagor and mortgagee when in possession to grant leases: C. A., s. 18. In some cases it may be necessary to vary this power; but it is conceived that the power ought not in any case to be entirely negatived.

(*b*) Power for mortgagee to sell and to insure against fire, and when in possession to cut and sell timber: C. A., ss. 19 to 23.

(*c*) Power for mortgagee to appoint a receiver: C. A., ss. 19, 24.

(*d*) Power for mortgagee to give a receipt for sale money and other money comprised in the mortgage, and trusts for application thereof: C. A., s. 22.

(9.) In a will, a devise of trust and mortgage estates is not required and should not be inserted (except in the case of copyhold or customary land to which there has been an admission), and is practically inoperative if inserted: C. A., s. 30. **Devise of trust and mortgage estates.**

(*a*) But where any trust of the accumulated rents and profits other than those stated in s. 42 (5) (iii.) is required, it must be mentioned.

Appointment of new trustees.

(10.) As to appointments of new trustees:—

(*a*) A power to appoint new trustees is only required where it is to be exercised otherwise than by the trustees or trustee for the time being: T. A., s. 10 (1).

(*b*) The original number of trustees need not be preserved, except that where there were originally two or more, one cannot be discharged unless two places at least remain full: T. A., ss. 10, 11.

(*c*) An appointment of new trustees should contain the proper declaration as to vesting; and where there are more than two trustees, and one simply retires and his place is not filled up, there must be a deed of consent to his discharge and to the vesting of the trust property in his co-trustees: T. A., s. 12.

Separate trustees.

(*d*) A separate set of trustees may at any time be appointed for each distinct trust: T. A., s. 10.

Powers of attorney.

(11.) As to powers of attorney:—

(*a*) A power given for valuable consideration can be made irrevocable in favour of a purchaser, lessee, or mortgagee: C. A., 1882, s. 8.

(*b*) Any power of attorney can, in favour of the same persons, be made irrevocable for any period not exceeding one year from its date: C. A., 1882, s. 9.

(*c*) The attorney may sign and seal in his own name: C. A., s. 46.

(*d*) Access to a power of attorney is enabled by means of deposit in the Central office, and office copies can be obtained: C. A., s. 48.

Executory limitations.

(12.) In instruments after 1882 an executory limitation over of an estate in fee, or for a term, on failure of issue, becomes incapable of effect when any of the issue attain the age of twenty-one years: C. A., 1882, s. 10. This section applies only to land or hereditaments.

(13.) Powers, whether coupled with an interest or not, can be disclaimed, in like manner as an estate can be disclaimed: C. A., 1882, s. 6; and can be released: C. A., s. 52. Disclaimer and release of powers.

(14.) Deeds may be supplemental or annexed instead of indorsed, and will be read as indorsed on, or containing a full recital of, the principal deed: C. A., s. 53. Supplemental deeds.

The L. T. A. 1897 contains (Part I.) provisions for the administration of the real estate of a deceased person by the personal representative; and (Part II. s. 16) provisions as to evidence of, and covenants for, title to registered land.

CHAPTER II.

THE VENDOR AND PURCHASER ACT, 1874.
37 & 38 VICT. c. 78.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land. [7th August, 1874.]

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

S. 1.

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Definition of "land" in Acts of Parliament.

The word "land" in Acts of Parliament passed since 1850 includes messuages, tenements, and hereditaments, houses and buildings of any tenure, unless the contrary intention appears: see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

Right of way.

A right of way is within this s.: *Jones* v. *Watts*, 43 Ch. D. 574. And see Co. Lit. 19 b, 20 a.

Leaseholds.

In the case of a leasehold interest more than forty years old, the vendor must produce the lease, but need not show the later title more than forty years old: *Williams* v. *Spargo*, W. N., 1893, 100.

Constructive notice.

A purchaser who agrees to take less than a forty years' title has constructive notice of anything which would have been disclosed by the abstract, if a proper forty years' title had been shown: *Re Cox & Neve*, 1891, 2 Ch. 109; *Re Nisbet & Potts*, 1905, 1 Ch. 391.

S. 2.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

Rules for regulating obligations and rights of vendor and purchaser.

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

See also C. A. ss. 3 (1), and 13, and notes thereto.

"Discovery" by litigant.

Under such a contract production cannot be called for, even under the rules as to the right of a litigant to discovery, unless a distinct issue is raised as to the goodness of the title: *Jones* v. *Watts*, 43 Ch. D. 574.

This rule shows that "contract of sale" in s. 1 includes a contract to grant a lease, and that the words "vendor" and "purchaser" include "lessor" and "lessee: *Jones* v. *Watts*, *sup.*

An agreement by the freeholder to deliver to the intended lessee an abstract of his title to grant the lease is "a stipulation to the contrary in the contract": *Re Pursell & Deakin*, W. N., 1893, 152.

Rule that lessee has notice of lessor's title not altered.

The rule that a lessee has constructive notice of his lessor's title was not altered by this s. He is now in the same position with regard to notice as if he had before this Act stipulated not to inquire into his lessor's title: *Patman* v. *Harland*, 17 Ch. D. 353, 358; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 397; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218. S. 3 of C. A., 1882, as to notice, makes no alteration in the case of a person who enters into a contract whereby he precludes himself from "making such inquiries and inspections as ought reasonably to have been made": see subs. (1) (i.) *Semble*, it is reasonable on a contract to grant or assign a mere occupation lease, for the intended lessee or assign not to make any inquiries or inspections, which, in default of agreement to the contrary, he is precluded from making by this rule and ss. 3 (1), and 13 of the C. A.; see *Imray* v. *Oakshette*, *sup.* at p. 229.

Contract : lease und power.

By s. 4 of C. A., 1882, the contract for a lease made under a power does not form part of the title to the lease.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

SS. 2, 3.

It is conceived that the deeds, &c., must be deeds, &c., affecting the land contracted to be sold.

Effect of recital twenty years old.

In *Bolton* v. *London S. Board*, 7 Ch. D. 766, a recital in a deed more than twenty years old that a vendor was seised in fee simple was held sufficient evidence of that fact, precluding the purchaser from demanding a prior abstract, except so far as the recital was proved to be inaccurate. The decision seems open to question, as it in effect negatives the recognized right of a purchaser to a proper abstract of title extending over forty years, which might show the recital to be inaccurate.

As to the effect of a recital under this s., see also *Re Marsh & Earl Granville*, 24 Ch. D. 11.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

See C. A., s. 9 (8).

"Inability to furnish."

A vendor must do his best to procure for the purchaser an acknowledgment with respect to documents not in his possession, and this rule only applies if his endeavours are unsuccessful.

Purchaser's equitable right to production of documents.

As to the purchaser's equitable right to production of documents, see Sug. V. & P. 14th ed., c. 11, s. 5; Dart, 7th ed., 483 *et seq.*; *Fain* v. *Ayers*, 2 Sim. & St. 533.

Lost documents.

As to lost documents, see *Re Halifax, &c., Co. & Wood*, 79 L. T. 536; W. N., 1898, 174.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents.

"An estate."

"An estate" means an estate in land, and a vendor is not entitled to retain documents which do not relate to any *land* retained by him, but only to personal property other than chattels real: *Re Williams & Duchess of Newcastle*, 1897, 2 Ch. 144.

Acknowledgment substituted for covenant.

Contracts for sale, where the vendor retains any documents, should now provide for giving an acknowledgment in writing of the right of the purchaser to the production, and delivery of copies under C. A.,

s. 9, and, where he is beneficial owner, also an undertaking for safe custody. The liability to give the covenant under s. 2, r. 4, of this Act, if incurred after 1881, is satisfied by an acknowledgment: C. A., s. 9 (8), (14).

As to the costs of attested and other copies of documents retained by the vendor, see C. A., s. 3 (6).

Trustees may sell, &c., notwithstanding rules.

3. *Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.*

Repealed by the T. A., but re-enacted by s. 15 of that Act.

Legal personal representative may convey legal estate of mortgaged property.

4. *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.*

Repealed and superseded by s. 30 of the C. A. as to deaths happening after 1881, which s. has in its turn been repealed by s. 45 of the Copyhold Act, 1887 (see now s. 88 of the Copyhold Act, 1894), so far as regards copyhold or customary land to which the mortgagee has been admitted. Such land now remains in the same position with respect to its devolution on death of the mortgagee as before the V. & P. A. The repeal did not revive or affect this s. of the V. & P. A. (see the Interpretation Act, 1889, s. 11), which remains operative as regards deaths between the 7th August, 1874, and the 1st January, 1882, or as regards deaths at any time before 1882, assuming that it applies to mortgagees dying before the commencement of the V. & P. A. (on which see *Re Spradbery's Mortgage*; *Re White's Mortgage, inf.*)

This s. did not apply to a transfer of mortgage: *Re Spradbery's Mortgage*, 14 Ch. D. 514; *Re Brook's Mortgage*, 25 W. R. 841; nor to a sale; *Re White's Mortgage*, 29 *ib.*, 820.

Bare legal estate in fee simple to vest in executor or administrator.

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.*

The expression "seised in fee simple" excluded copyholds and customary freeholds from the operation of this s.

Repealed as to England on and after the 1st January, 1876, by the L. T. A., s. 48, except as to anything duly done thereunder before that date. Re-enacted by the same s. with an amendment confining

SS. 5, 6, 7.

its operation to a bare trustee dying intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, which s. has in turn been repealed by the C. A., s. 30, in case of deaths occurring after 1881. It would seem therefore that where nothing had been done under this s. before 1876, the hereditament of a bare trustee dying testate, and vested in his personal representative solely by force of this s., became divested and devolved as if the V. & P. A. had not been passed. Thus, up to the 1st January, 1882, where nothing had been done under this repealed s. before 1876, the devise by a bare trustee of his trust estate is operative.

Repealed as to Ireland by the C. A., s. 73, in case of deaths happening after 1881.

Meaning of "bare trustee."

There is no distinction now between the case of a bare trustee and any other trustee dying after 1881. A bare trustee is a trustee to whose office no duties were originally attached, or who, though such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it: Dart, 7th ed., 543-4; though in the opinion of V.C. Hall the words "has been requested by them so to convey it" are not a necessary ingredient in the definition of a bare trustee: *Christie* v. *Ovington*, 1 Ch. D. 279. The word "bare" does not merely mean that the trustee has no beneficial interest: *Re Cunningham & Frayling*, 1891, 2 Ch. 567; but a trustee with a beneficial interest is not a bare trustee: *Morgan* v. *Swansea &c. Authority*, 9 Ch. D. 582 (but see *Re Docwra*, cited on next s.); nor is the husband of a married woman who is seised in her right a bare trustee within the Act 3 & 4 Will. 4, c. 74, s. 31 (*Keer* v. *Brown*, Johns. 138).

Married woman who is a bare trustee may convey, &c.

6. *When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.*

Repealed by the T. A., but re-enacted by s. 16 of that Act.

This s. applies to trust estates devolving before 1883 and after 1882.

The aid of this s., or of the re-enactment, is required in case of trust estates devolving on a married woman not only before 1883, but also after 1882. The M. W. P. A. does not help her: see *Re Harkness & Allsopp*, 1896, 2 Ch. 358.

Though a married woman who is trustee under a trust for sale takes an interest in the proceeds of sale, she is nevertheless a bare trustee within this s., where the sale is made under an order of the Court: *Re Docwra*, 29 Ch. D. 693.

See also n. to T. A., s. 16.

Protection and priority by legal estate and tacking not to be allowed.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or*

interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.

SS. 7, 8.

Repealed as to England by the L. T. A., s. 129, and as to Ireland by the C. A., s. 73. In force in England between 7th August, 1874, and 1st January, 1876. The effect of this s. was to prevent a first mortgagee from being safe in making a further advance, his security for which became under this s. postponed to all intermediate mortgagee.

Protection by tacking is taken away, as to land in the three Ridings of Yorkshire, by s. 16 of the Yorkshire Registries Act, 1884.

Yorkshire land.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Non-registration of will in Middlesex, &c., cured in certain cases.

As to the time allowed for the registration of wills in Middlesex, see 7 Anne, c. 20, ss. 8–10, and for the registration of wills in the W. Riding of Yorkshire, 2 & 3 Anne, c. 4, ss. 20, 21; in the E. Riding, 6 Anne, c. 35, ss. 14, 15; and *Chadwick* v. *Turner*, 1 Ch. 310; and in the N. Riding, 8 Geo. 2, c. 6, ss. 15–17, in the case of testators dying before 1st January, 1885. The time allowed for the registration in the three Ridings of Yorkshire of wills of testators dying on or after that day is now governed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 11, 14, as amended by 48 Vict. c. 4, and the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

Time for registration of wills in Middlesex and Yorkshire.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

S. 9.

arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Cases under this s.

This s. has been held to apply to a contract for a lease at a premium: *Re Anderton & Milner*, 45 Ch. D. 476; and to a lease without a premium: *Re Stephenson & Cox*, 36 Sol. J., 287; *Re Lander & Bagley*, 1892, 3 Ch. 41; *Re Pursell & Deakin*, W. N., 1893, 152; and see the language of s. 1 and s. 2, subs. 1, above; but *semble* the s. does not apply to a contract for an exchange; see *Re British Land Co. & Allen*, 44 Sol. J. 593.

In proceedings under this s. the parties are in the same position as under a reference as to title in an action for specific performance, and accordingly evidence by affidavit as to questions of title raised by the requisitions is admissible (*Re Burroughs & others*, 5 Ch. D. 601). As to recovery under this s. of interest wrongly paid, see *Re Young & Harston*, 29 Ch. D. 691, 31 *ib.* 168.

Recovery of deposit with interest and costs.

The deposit may be recovered with interest: *Re Smith & Stott*, 29 Ch. D. 1009 *n.*; *Re Hargreaves & Thompson*, 32 *ib.* 454; *Re Higgins & Percival*, 59 L. T. 213; *Re Lord & Fullerton*, 1896, 1 Ch. 228, 233; *Re Marshall & Salt*, 1900, 2 Ch. 202; *Re Walker & Oakshott*, 1901, 2 Ch. 383; but not where the purchaser could only recover the deposit by raising a question affecting the validity of the contract; *Re Davis & Cavey*, 40 Ch. D. 601; and the purchaser may be allowed his costs of investigating the title: *Re Higgins & Hitchman*, 21 Ch. D. 99; *Re Yeilding & Westbrook*, 31 *ib.* 344; *Re Hargreaves & Thompson* and other cases *sup.*, which may be charged on the vendor's interest in the property: *Re Yeilding & Westbrook, sup.*; *Re Higgins & Percival, sup.*; *Re New Land Development Association & Gray*, 1892, 2 Ch. 138, 146.

The validity of a notice to rescind may be decided: *Re Jackson & Woodburn*, 37 Ch. D. 44; but not a question as to the existence or validity of the contract in its inception: see *S. C.* and *Re Davis & Cavey, sup.*; *Re Sandbach & Edmondson*, 1891, 1 Ch. 99. 102; *Re*

Lander & Bagley, sup.; or as to the destination of the purchase-money, if it does not concern the purchaser: *Re Tippett & Newbould*, 37 Ch. D. 444; nor a preliminary question of fact: *Re Gray & Met. Ry. Co.*, 44 L. T. 567. SS. 9, 10.

Semble, where either party contracts to pay the other's costs, a question as to the amount thereof is not properly raised upon a summons under this s.: *Re Webster & Jones*, 1902, 2 Ch. 551. Costs.

The Court will not refuse to decide questions raised under this s. merely on the ground that specific performance of the contract would not be enforced, as the contract may be effective for purposes of other relief; *Re Lander & Bagley, sup.*; or on the ground that either party may have a right to obtain rescission of the contract: *Re Wallis & Barnard*, 1899, 2 Ch. 515; *Re Hughes & Ashley*, 1900, 2 Ch. 595.

Not every loss arising in connection with the contract can be assessed as compensation under this s.: see *Re Wilsons & Stevens*, 1894, 3 Ch. 546 (damages for delay in completion).

The Court has jurisdiction upon a *vendor's* summons to make an order for rescission of the contract, and return of the deposit with interest and costs: *Re Higgins & Percival, sup.*, *Re Walker & Oakshott, sup.*; and a vendor cannot, after a decision against him, avail himself of a condition empowering him "notwithstanding any previous . . . litigation" to rescind *without payment of costs: Re Arbib & Class*, 1891, 1 Ch. 601; and as to the jurisdiction of the Court to order the vendor to pay the costs of litigation pending at the date of rescission notwithstanding such a condition, see *Re Spindler & Mears*, 1901, 1 Ch. 908.

As to re-opening, in an action for specific performance, a question decided on a summons under this s., see *Scott* v. *Alvarez*, 1895, 1 Ch. 596, 621, 622.

As to interest, where delay in completion arises from vendor's wilful default, see *Re Hetling & Merton*, 1893, 3 Ch. 269; *Re Wilsons & Stevens, sup.*; *Re Earl of Strafford & Maples*, 1896, 1 Ch. 235; *Re Wood & Lewis*, 1898, 2 Ch. 211; *Bennett* v. *Stone*, 1903, 1 Ch. 509.

As to the proper course where an order under this s. is not complied with, see *Thompson* v. *Ringer*, 29 W. R. 520.

For forms of summons, see D. C. F. Nos. 2289, 2290. The summons cannot be served out of the jurisdiction: *Re Busfield*, 32 Ch. D. 123. As to the time for appealing from an order under this s., see *Re Blyth & Young*, 13 Ch. D. 416; *Re Walker & Oakshott*, W. N., 1902, 147. Practice.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874. Extent of Act.

CHAPTER III.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.
44 & 45 VICT. c. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2.

I.—PRELIMINARY.

PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

2. In this Act—

Interpretation of property, land, &c.

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

As to effect of the word "includes" in an interpretation clause in an Act, see *Robinson* v. *Local Board of Barton-Eccles*, 8 A. C. 798, at p. 801; *Rodger* v. *Harrison*, 1893, 1 Q. B. 161, 167: for effect of the word "means," see *Re Potts*, 1893, 1 Q. B. 648, 658.

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

For the meaning of "land" in Acts of Parliament, see *sup.* note to V. & P. A., s. 1.

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

Reputed manor.

Where all the freehold estates held of a lord are purchased by him or devolve on him by escheat, whereby the services become extinct, the manor ceases to exist; also, there cannot be a manor without a court baron; and no court baron can be held without two freeholders as suitors at least. In case there be not two suitors the manor becomes a reputed manor, or manor in reputation; and continues to have certain rights and franchises which were appendant to the manor (1 Cruise, Dig. p. 34), as the right to wrecks, estrays, &c.: 1 Watk. Cop. 22; and the right to appoint a sexton of a parish: *Soane* v. *Ireland*, 10 East, 259; and if there be but one free tenant the seignory as to him remains with respect to his services, though there can be no court held: 1 Watk. Cop. 22. If however there are copyholders the customary court remains: Co. Lit., 58 a.

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

See exceptions to this definition of conveyance, s. 7 (5), *infrà*.

It seems that the grant of an exclusive licence to manufacture and sell a patented article is not a "conveyance": *Guyot* v. *Thomson*, 1894, 3 Ch. 388, 398.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time

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to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

See, as to the definition of "mortgage," *Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506.

As to the persons entitled to redeem, see *Tarn* v. *Turner*, 39 Ch. D. 456; Seton, 6th ed., 1935–1937. A mortgagor who has absolutely assigned the equity of redemption acquires a new right to redeem upon being sued by the mortgagee: *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

"Mortgagee" whether legal or equitable, see *Lloyds Bank* v. *Bullock*, 1896, 2 Ch. 192, 197.

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

The word "rent" is not used in this Act in its strict sense: *Brown* v. *Peto*, 1900, 2 Q. B., 653, 664.

Rent "in kind."

There may be a reservation of rent in kind: see Co. Lit., 142 a; *Rex* v. *Earl Pomfret*, 5 M. & S. 139, 143; *Re Moody & Yates*, 30 Ch. D. 344, pp. 346–7.

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

Compare S. L. A. s. 2 (10), (iii), and see n. thereto.

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law, having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

Winding-up of Company.

The words "and any other act . . . those of bankruptcy" include the liquidation of a company under the Companies Act, 1862: *Horsey Estate Ltd.* v. *Steiger*, 1899, 2 Q. B. 79; *Fryer* v. *Ewart*, 1902, A. C. 187.

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

Compare now Interpretation Act, 1889, s. 19.

(xviii.) Her Majesty's High Court *of Justice* is referred to as the Court.

The words in italics were repealed by the Statute Law Revision Act, 1898.

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See, on this subs., *Lock* v. *Pearce*, 1893, 2 Ch. 271, 275, 279; see also s. 69 (1), and *Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254.

As to the exercise of the powers of the Court in regard to land in the Counties Palatine of Durham and Lancaster, see s. 69 (9), and note thereon; and as to the application of this Act to Ireland, see s. 72.

Singular includes plural, &c.

In Acts of Parliament passed after 1850 singular includes plural, plural singular, masculine includes feminine, and month means calendar month unless the contrary intention appears: see the Interpretation Act, 1889, ss. 1, 3.

SALES AND OTHER TRANSACTIONS.

II.—SALES AND OTHER TRANSACTIONS.

Contracts for Sale.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Title to underlease.

This is supplementary to s. 2, rule 1, of V. & P. A., and (following that Act) does not apply to a lease for lives. It places the title to an underlease, in regard to showing the lessor's title, on the same footing as the title to a lease from the freeholder (see also note to s. 13 of this Act), and the assignee has in like manner constructive notice of the underlessor's title: *Patman* v. *Harland*, 17 Ch. D. 353; *Re Cox & Neve*, 1891, 2 Ch. 109, 117; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 394, 397; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218. As to the effect of C. A., 1882, s. 3, see note to V. & P. A., s. 2, subs. 1.

The dictum in reference to this s., at the end of the judgment in *Gosling* v. *Woolf*, 1893, 1 Q. B. 39, seems to ignore the distinction between the grant of a term "*de novo*," to which s. 13 relates, and the assignment of an existing term, to which this subs. relates.

How far objections, &c., are precluded.

This and subs. 3 preclude the purchaser from calling for or making any requisition, objection, or inquiry as to the underlessor's title, as between vendor and purchaser, but it does not alter the rule enabling the purchaser to prove the lease to be defective *aliunde*: and see note to subs. 3.

Contract for lease under power not part of title.

By s. 4 of C. A., 1882, a contract for a lease made under a power is excluded from forming part of the title to the lease.

Title to enfranchised copyholds.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

Under this subs. the title to the freehold of enfranchised copyholds is placed on the same footing as the title to a lease, and commences with the deed of enfranchisement. This subs. should be read in connection with subs. 3, under which a purchaser is precluded from requiring production of documents recited in the enfranchisement deed, and is bound to assume the correctness of the recitals.

Where, on an enfranchisement, mineral rights are reserved to the lord, the purchaser may object to the title: *Upperton* v. *Nickolson*, 6 Ch. 436, 444; *Bellamy* v. *Debenham*, 1891, 1 Ch. 412; cf. *Kerr* v. *Pawson*, 25 Beav. 394.

Meaning of purchaser in this s.

The word "purchaser" in this and the subsequent subss. of this s. means (notwithstanding the definition clause) a purchaser on a sale only: subs. 8.

A copyholder obtaining enfranchisement after 1881 seems not entitled, in the absence of an agreement, to a statutory acknowledgment and undertaking with respect to the documents relating to the freehold title: see *Re Agg-Gardner*, 25 Ch. D. 600, 604. But the exact point did not require decision, and it may be a question whether the dictum is right: compare *Re Pursell & Deakin*, W. N., 1893, p. 152. The s. does not say the copyholder himself may not call for the title, only that a purchaser of the freehold after enfranchisement may not. The acknowledgment and undertaking may be necessary for other purposes than that of a sale, *e.g.* a mortgage.

The following subss. 3, 6, 7, are not confined to land.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that

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every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment or otherwise.

See s. 2 (xii.) (xvi.).

Production of or inquiry into early title.

This s. does not prevent objection if the recitals show a bad or insufficient title; or if the purchaser can show *aliunde* that the title is bad, *e.g.* that there are restrictive covenants affecting the land: *Nottingham &c. Brick Co.* v. *Butler*, 15 Q. B. D. 261; 16, *ib.* 778; *Re Cox & Neve*, 1891, 2 Ch. 109; *Re Nisbet & Potts*, 1905, 1 Ch. 391.

On the two first clauses of this subs., see and consider *Re National Provincial Bank & Marsh*, 1895, 1 Ch. 190, and the cases there cited.

Specific performance.

That decision, and the later cases of *Scott* v. *Alvarez*, 1895, 2 Ch. 603, 614; *Life Interest &c. Corpn.* v. *Hand-in-Hand &c. Society*, 1898, 2 Ch. 230, 239, establish the distinction between the right to retain the deposit and the right to specific performance.

Contract should still fix date for commencement of title.

It is still advisable to provide expressly in all contracts as to the date at which the title is to commence. The V. & P. A. leaves it open, where this is not done, to require an earlier title than forty years in cases similar to those in which an earlier title than sixty years could previously have been required. Thus where the first abstracted instrument was a will containing a general devise, or a conveyance under a trust for sale, or under a power, or the bar of an entail, or contained recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents, a purchaser was, under the old law, entitled to an abstract of the earlier title, and it may be said that the time back to which that earlier title should be shown is the time "prescribed by law for commencement of the title" within this s.: see *Parr* v. *Lovegrove*, 4 Dr. 170; Dart, V. & P., 7th ed., 331 *et seq.* But having regard to the express language of this s. no objection could now be taken to an instrument as a root of title, merely on the ground that it exercised a power.

And where it is stipulated that the title should commence with a particular instrument, the nature of the instrument should in every case be clearly stated in the contract: *Re Marsh & Earl Granville*, 24 Ch. D. 11; and see 43 Sol. J. 638. If this is not done, and the instrument was made less than forty years back under circumstances in which ordinarily there would be no investigation of title, *e.g.* in the case of a voluntary settlement (*Re Marsh & Earl Granville, sup.*), the purchaser might successfully resist specific performance (see subs. 11 *inf.*), even if he could not recover his deposit. And it is conceived that, unless the contract expressly provides otherwise, a condition that the title should commence with a particular deed, the date of which is specified, is not satisfied if such deed does not deal with the whole estate, legal and equitable, contracted to be sold, *e.g.* is a

transfer of mortgage, or a conveyance of an equity of redemption; and in such a case no *time* is stipulated for commencement of the title to any estate or interest not dealt with by such deed.

The rule laid down by this subs. is necessarily subject to qualification in the following cases:—

(*a*) Where a prior deed is incorporated by reference in an abstracted deed, *e.g.* where the property has been conveyed to the uses or upon the trusts of a settlement;

(*b*) Where an abstracted deed is supplemental to a prior deed (see s. 53, *inf.*);

(*c*) Where the property is in an abstracted deed conveyed subject to covenants or conditions contained in a prior deed; and

(*d*) Where evidence to which the purchaser is entitled can only be furnished by production of a prior deed.

In these cases the prior deed must be produced, and in cases (*a*), (*b*) and (*c*) abstracted. In cases (*b*) and (*c*) it may sometimes be sufficient for the instrument to be produced.

Constructive notice.

As to the bearing of this subs. on the doctrine of constructive notice, see note to C. A., 1882, s. 3 (2).

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

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"Unless the contrary appears."

"The receipt."

The receipt is only *primâ facie* evidence, "unless the contrary appears," and the vendor's obligation to make a good title is not removed by the knowledge of the purchaser at the date of the contract, that a covenant had been broken, unless by the contract or otherwise the purchaser is debarred from objecting on this ground: *Barnett* v. *Wheeler*, 7 M. and W. 364; *Re Highett & Bird*, 1903, 1 Ch. 287; as explained by Romer, L.J., in *Re Allen & Driscoll*, 1904, 2 Ch. 226 at p. 231.

The receipt of the superior landlord for ground rent paid by the tenant under threat of distress is not sufficient under subs. 5: *Re Higgins & Percival*, 57 L. J. Ch. 807; 59 L. T. 213. As to the purchaser's right when the title to the reversion is in dispute, see *Pegler* v. *White*, 33, Beav. 403. As to what will be evidence of no breach, where no receipt is forthcoming, see *Ringer to Thompson*, 51 L. J. Ch. 42.

Lease at a nominal rent.

Subss. 4 and 5 cover breaches after the contract and up to completion in all cases where a rent is reserved: see *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19. But they do not apply to the exceptional case of a lease at a peppercorn rent (*Re Moody & Yates*, 28 Ch. D. 661; 30 *ib.* 344), and in such a case it should be expressly provided that the mere fact of possession at the time of completion of the purchase is to be sufficient evidence of performance. A special condition will also be necessary where a sub-term created for mortgage purposes is sold without the head-term.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying, is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which

a purchaser requires to be delivered to him, shall be borne by that purchaser.

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As to the expense of producing documents and of attested copies which, but for this subs., would be borne by the vendor, see Sug. V. & P., 14th ed., pp. 446-53. This subs. alters the rule as to the expense of journeys established by *Hughes* v. *Wynne*, 8 Sim. 85.

Expenses of production.

Expenses in reference to documents and abstracts of documents not in the possession of the vendor, even if they are the root of or links in the title, and he can procure their production—as in the case of deeds in the possession of his mortgagees—are, by this subs., thrown on the purchaser: see *Re Willett & Argenti*, W. N., 1889, 66; 60 L. T. 735; *Re Ebsworth & Tidy*, 42 Ch. D. 23, 34; *Re Stuart & Olivant*, 1896, 2 Ch. 328; this was the intention. In the case of *Re Johnson & Tustin*, 28 Ch. D. 84, Pearson, J., considered that this subs. enabled a vendor who had no deeds in his possession except the conveyance to himself to throw on the purchaser the whole expense of making an abstract of the prior title, but this decision was reversed: 30 *ib.* 42. Every document of title, from the commencement of the title, must be abstracted in chief by the vendor: *Re Ebsworth & Tidy*, 42 Ch. D. 23, 34; *Re Stamford &c. Bank & Knight*, 1900, 1 Ch. 287. If there are any documents of which the vendor cannot procure the production he should protect himself against production by a special condition: *Re Halifax &c. Co. & Wood*, 79 L. T. 536; W. N., 1898, 174.

Where documents cannot be produced.

The subs. does not affect the purchaser's right to have, at the vendor's expense, the title deeds on completion: *Re Duthy & Jesson*, 1898, 1 Ch. 419.

Cases not within this subs.

Where the lessee covenants to complete a house to the satisfaction of the lessor's surveyor, the certificate of the surveyor as to completion is part of the title, and it must be obtained at the vendor's expense: *Re Moody & Yates*, 28 Ch. D. 661; 30 *ib.* 344; and it is conceived that the same principle applies to a certificate under s. 11 of the Finance Act, 1894.

Negative searches in the Irish Deeds Registry must be furnished at the vendor's expense: *Murray & Hegarty's Contract*, 15, L. R. Ir. 510. The Irish practice is to furnish copies as well as an abstract: *Re Furlong*, 23 L. R. Ir. 407.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchases on sales properly so called, notwithstanding any interpretation in this Act.

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(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

Meaning of "sales made."

A sale is made when there is a complete contract for sale. The purchase-money then becomes personal estate of the vendor, and the land then becomes real estate of the purchaser: see *Lysaght* v. *Edwards*, 2 Ch. D. 499, and note to s. 4.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

See *Re National Provincial Bank & Marsh*, 1895, 1 Ch. 190; *Scott* v. *Alvarez*, 1895, 2 Ch. 603, 612–14.

Effect of an open contract since the Act.

Under this s., taken in connection with the V. & P. A., and in particular ss. 1 and 2 of that Act, a vendor having a title such as is usually accepted by a willing purchaser, may safely enter into an open contract for sale, without fear of being put to undue expense in answering requisitions or furnishing evidence. At the same time the purchaser will not incur more risk than in buying under suitable conditions of sale, since subs. 11 reserves to him every defence in an action for specific performance: see note to subs. 3 of this s.

Trustees protected.

Trustees may buy or sell under contracts within this s. (see s. 66); and as to contracts under the V. & P. A., s. 2, see s. 15 of the T. A.

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under

any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

See now the wider provisions of L. T. A. 1897, ss. 1 & 2, *inf.*

"Personal Representative": for the meaning of these words, compare s. 30: see *Re Parker's Trusts*, 1894, 1 Ch. 707.

When vendor not trustee.

This s. should be read in connection with s. 30, and is not rendered unnecessary by that s. A vendor who has contracted to sell is not a trustee unless the contract is valid and binding on *both* parties at his death: *Lysaght* v. *Edwards*, 2 Ch. D. 499; and not even then, it seems, unless he received the purchase-money, or a decree for specific performance has been, or would as a matter of course be, made: *Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. D. 333; *Re Pagani*, 1892, 1 Ch. 236; *Re Beaufort*, W. N., 1898, 148.

Case where action may still be necessary.

The s. applies to all cases where there is a contract "enforceable against the heir or devisee," that is at least to all cases where there is a clear written contract signed by the deceased vendor. The purchaser may then waive all objections and insist on performance, and an action will not now be required merely to obtain the legal estate where the vendor has died, having devised the land in settlement or otherwise in such manner that no conveyance can be obtained. But if there is any doubt whether a contract binding on the vendor subsisted at his death, an action will still be necessary. This might happen in case of a parol contract and alleged part performance. Matters are in fact placed in the same position as if there was a devise of the fee to trustees.

This s. not required where legal estate is outstanding.

Where the legal estate is outstanding at the time of the vendor's death, the aid of this s. is not required. The person in whom it is outstanding can convey, and the personal representative can give a discharge for the purchase-money. This makes a complete title.

Does not apply to tenant in tail or copyholds.

The s. does not apply to a contract by a tenant in tail which by his death becomes incapable of being enforced. Nor does it apply to copyholds.

Estates *pur autre vie.*

It applies, however, to an estate *pur autre vie* where it would devolve on the heirs general as special occupants, which is a *quasi* descent: Burton, pl. 731, *Doe* v. *Robinson*, 8 Barn. & Cr. 296. If the executors or administrators take as special occupants the aid of this s. is not required. Leaseholds for lives devised in settlement are usually vested in trustees, in which case also a conveyance can be made independently of this s.

The s. does not apply to the peculiar case of the vendor having a power of appointment which he does not exercise, the property being settled in default of appointment: see *Morgan* v. *Milman*, 3 D. M. & G. 24.

As to the "beneficial rights" mentioned in subs. 2, see Theobald on Wills, 6th ed., 163, 254, 255.

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Discharge of Incumbrances on Sale.

Provision by Court for incumbrances, and sale freed therefrom.

Discharge of Incumbrances on Sale.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

This s. is confined to cases of sales only.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

See *Patching* v. *Bull*, 30 W. R. 244; W. N., 1882, 113; *Dickin* v. *Dickin*, 30 W. R. 887; *Milford &c. Co.* v. *Mowatt*, 28 Ch. D. 402; *Archdale* v. *Anderson*, 21 L. R. Ir. 527; Seton, 6th ed., pp. 336, 337, 1914; *Re Freme*, 1895, 2 Ch. 256, 264.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally

may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

Discharge of Incumbrances on Sale.

For the purpose of bringing this s. into play, the Court will declare future rights: *Re Freme, sup.*, and, on appeal, *ib.* 778, 780.

How application to Court made.

See definition of incumbrance, s. 2 (vii.); also *Re Bective Estates*, 27 L. R. Ir. 364, 369. Under s. 69, subs. 3, the application to the Court will be by summons; subss. 4, 5, and 6 provide for the notices to be given; subs. 7 provides for costs.

As to perpetual charges, see s. 45.

Facilities given for sale of encumbered estates.

This s. greatly facilitates sales of encumbered estates, especially when taken in connection with ss. 15, 16, and 25. It applies to ordinary sales, as well as sales by the Court. Suppose the estate to be subject to a jointure or portions for younger children under age, and therefore not yet raisable, the owner in fee could not sell free from the jointure unless the jointress consented to release, and must necessarily sell without any release of the portions and subject to depreciatory conditions as to indemnity, or leave them a charge to be allowed out of the purchase-money; but see *Re Mundy & Roper*, 1899, 1 Ch. 275; *Re Lord Wimborne & Browne*, 1904, 1 Ch. 537; *Re Phillimore's Estate*, 1904, 2 Ch. 460; where there is a person having the powers of a tenant for life.

Costs of application.

Under this s. and ss. 15, 16, and 25, the course will be simple. In the case of a sale by the Court the proper amount can be set aside out of the purchase-money when paid in. In the case of a sale out of Court, the owner can, when the contracts are signed, and on the faith of the incoming purchase-money, generally procure a temporary advance of the amount required to be paid into Court to answer the charges, and thus at once obtain a conveyance or vesting order (s. 5, subs. 2). By s. 69, subs. 7, the Court can direct by whom the costs of any application are to be paid.

What incumbrances included.

A capital sum or an annuity payable out of rents and profits or a capital sum charged on a reversionary interest are within this s. (see s. 2 (vii.)). An annual sum, whether terminable or otherwise, charged on land, and a capital sum charged on a determinable interest in land, constitute the two cases where a capital sum could not be or might not properly be applied out of the proceeds of sale in discharge of the incumbrance. In the one case the annuitant is entitled to have payment of the annual sum continued to him; in the other case, capital money should not be applied in payment of the charge to the prejudice of the remainderman. Therefore this s. provides for the application of dividends only in payment.

Vendor not compelled to act on this s.

It seems that a vendor will not be compelled to make use of this s. for discharging an incumbrance—at least, where it would inflict hardship on him: *Re G. N. R. Co. & Sanderson*, 25 Ch. D. 788, where the learned judge seemed to think that the s. does not apply to a rent-charge created under the provisions of an Act of Parliament,

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Discharge of Incumbrances on Sale.

sed qu. It has been treated as applying to rent-charges annexed to a benefice by conveyance under 29 & 30 Vict. c. 111, s. 9: *Earl of Devon's S. E.*, 7 May 1896, Reg. Lib. A. 1179.

It is conceived that any surplus income after paying the annual sum for keeping down interest on the principal sum should be paid to the vendor and not accumulated as an addition to the fund.

General Words.

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages, whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge,

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SALES AND OTHER TRANSACTIONS.

General Words.

rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments, whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

"Contrary intention."

See, on this subs, *Beddington* v. *Atlee*, 35 Ch. D. 317, 331; *Birmingham &c. Co.* v. *Ross*, 38, *ib.*, 295, 308; *Broomfield* v. *Williams*, 1897, 1 Ch. 602.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Effect of contracts unaltered.

This s. does not enlarge the rights of a purchaser under his contract. If the vendor, before the Act, was not bound to give the purchaser all the appurtenances specified in the s., he can still limit his conveyance accordingly: *Re Peck & School Board for London*, 1893, 2 Ch. 315; and see *Re Hughes & Ashley*, 1900, 2 Ch. 595.

Use of general words as to land or houses.

The object of inserting general words in a conveyance was to prevent any question as to whether a particular easement or right would or would not pass without those words. In most cases the words might be useless; still in some case they might be required, as for instance, to pass reputed rights and easements. As a general rule in case of land and houses they merely express what is included in the description, or forms part and parcel of the land or houses, and the rights and easements appurtenant thereto, *i.e.* annexed by express or implied grant, and all these pass with the land or houses (Williams Real P. 19th ed., 415). But where an easement has become extinct by unity of possession of the dominant and servient tenements, a conveyance of land or a house "with all easements therewith used and

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SALES AND OTHER TRANSACTIONS.

enjoyed," will operate as a grant *de novo* of the easement which, though at one time appurtenant, had been extinguished (*Barlow* v. *Rhodes*, 1 Cr. & M. 448; Gale, 7th ed., 78, 79). Even where no easement existed before the unity of possession, but a way was used with one tenement over the other, a grant of the first-mentioned tenement, "together with all ways now *used* or *enjoyed therewith*," would pass a right of way: *Barkshire* v. *Grubb*, 18 Ch. D. 166; and in some cases the result would be the same, even without any general words: *Brown* v. *Alabaster*, 37 Ch. D. 490, at p. 507; see also *Watts* v. *Kelson*, L. R. 6 Ch. Ap. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Baring* v. *Abingdon* 1892, 2 Ch. 374, at pp. 390, 398-9, 402; but not as a general rule if the grant were only "with all ways appurtenant thereto": *Harding* v. *Wilson*, 2 B. & C. 96; *Bolton* v. *B.*, 11 Ch. D. 968; *Barlow* v. *Rhodes*, *sup.*; *Brown* v. *Alabaster*, *sup.*; *Thomas* v. *Owen*, 20 Q. B. D. 225. A conveyance after 1881 will similarly operate to pass reputed easements under this Act, without any express general words: *Broomfield* v. *Williams*, 1897, 1 Ch. 602; *Pollard* v. *Gare*, 1901, 1 Ch. 834; and see *Brazier* v. *Glasspool*, W. N., 1901, 237; also a way actually used by the grantee at the date of the conveyance, though used only by permission of the grantor: *International &c. Co.* v. *Hobbs*, 1903, 2 Ch. 165; but not an easement which the grantor has no power to grant expressly: *Quicke* v. *Chapman*, 1903, 1 Ch. 659; nor a precarious right unknown to the law: *Burrows* v. *Lang*, 1901, 2 Ch. 502; nor a right of way that is not obvious and apparent: *Titchmarsh* v. *Royston Water Co.*, 81 L. T. 673; nor a right to light over adjoining land which the grantor has already contracted to sell: *Beddington* v. *Atlee*, 35 Ch. D. 317; and see *Davies* v. *Thomas*, W. N., 1899, 244; nor a right to light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant, and known to the grantee: *Birmingham &c. Co.* v. *Ross*, 38 Ch. D. 295; *Godwin* v. *Schweppes, Ltd.*, 1902, 1 Ch. 926.

General Words.

Easements used or enjoyed with but not appurtenant to land.

General words as to manors.

The general words used in a conveyance of a manor either (1) express what is included in the description as parcel of the manor; see Shep. Touch. 92; or (2) they are royal franchises, which if they are appurtenant to the manor pass without express words, but not otherwise; see *Morris* v. *Dimes*, 1 Ad. & E. 654. For definition see s. 2 (iv).

Mines and minerals.

Mines and minerals pass under a conveyance of land without being expressly mentioned, except in copyhold or customary assurances and except in conveyances to railway companies, from which latter they are excepted unless expressly mentioned; see 8 & 9 Vict. c. 20, s. 77. They are therefore omitted from the general words which by this s. are made applicable to land and houses, but are included in the general words applicable to manors, as they may in some cases have become severed from the manor, and once severed could not be reunited to it as they might be to the surface of land when both become vested in the same owner. It may be a question whether an enfranchisement of copyholds by conveyance of the fee simple reserving the minerals would not operate as a severance.

Covenants for Title.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

Covenant need not be expressed to be for heirs, &c.

This clause should be read in connection with s. 64, making singular include plural and plural singular in implied covenants. S. 59 (2), and subs. 6 of this s. render it unnecessary to provide expressly that the covenant shall be by the conveying party "for himself, his heirs, executors, or administrators," or that it shall be with the "heirs and assigns" of the party to whom the conveyance is made. As regards acts to be done under the covenant, when made with two or more, this s. should be read with s. 60 (1) (2).

Joint and several covenants, how implied.

Therefore when "A. and B." as beneficial owners hereby convey, it is implied that "A. and B." (plural, s. 64) "hereby for themselves, their heirs," &c. (s. 59 (1) (2)), "covenant," that is, they give a joint covenant. When "each of them A. and B. as beneficial owner hereby conveys," it is implied that "each of them hereby for himself, his heirs," &c. (s. 59 (1) (2)), "covenants," that is, each gives a several covenant. Where they convey in both modes they give joint and several covenants. Again, in the covenant for further assurance the words "at the request and cost of the person," &c., where the conveyance is to several jointly, include "persons" (s. 64) and the survivors or survivor of them, and the person on whom the right to sue on the covenant devolves (s. 60 (1) (2)).

Covenant applies to subject *expressed* to be conveyed.

The covenant of a conveying party is implied "as regards the subject-matter or share of subject-matter *expressed* to be conveyed by him"; as to the meaning of which words see *May v. Platt*, 1900, 1 Ch. 616. It is not material that he should actually convey the whole beneficial interest in order to give the implied covenant as to the whole: see *Re Ray*, 1896, 1 Ch. 468, 474–5. Therefore, in the case of a conveyance by tenant for life and remainderman if they both convey as beneficial owners covenants will be implied by both as to the whole fee, joint or several or both, according to the mode in which

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SALES AND OTHER TRANSACTIONS.

Covenants for Title.

they convey. Hence in a conveyance by tenant for life, and remainder-man for life, or in tail or in fee, or by joint tenants, or tenants in common, there can be implied covenants joint or several or both, as to the entirety or part, as may be required.

Conveyance by one to himself and another.

Where the conveyance is by one to himself jointly with another—as it might be under s. 50, or under 22 & 23 Vict. c. 35, s. 21—it seems doubtful if any implied covenant can be given: see *Moffatt* v. *Van Millingen*, 2 Bos. & P. 124, note (c); *De Tastet* v. *Shaw*, 1 B. & A. 664; *Rose* v. *Poulton*, 2 B. & Ad. 822; *Faulkner* v. *Lowe*, 2 Ex. 595; *Beecham* v. *Smith*, E. B. & E. 442.

Covenants applicable to all property.

The covenants in this s. are applicable to property of all kinds, including policies of assurance, reversionary interests in personal estate, choses in action, and personal chattels; see the definition of conveyance, s. 2 (v.).

As to the covenants implied by this s. being introduced into registered dispositions of land, see L. T. R. 1903, r. 99.

As to the rights of a purchaser of registered land to any covenants for title at all, see L. T. A., 1897, s. 16 (3).

As to covenants for title implied by the L. T. A.'s, see L. T. A., ss. 24, 39; L. T. R. 1903, rr. 132, 138, 139.

On conveyance for value, by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his

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direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to

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whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

"*Conveys and* is expressed to convey:" see *Re Ray*, 1896, 1 Ch. 468, 474-5.

As to covenants by joint tenants, compare *National Society &c.* v. *Gibbs*, 1900, 2 Ch. 280; and see note in Wolst. and Capron, Forms and Precedents, 6th ed., 207; as to covenants by tenants in common, see *Sutton* v. *Baillie*, 65 L. T. 528.

How conveying party to be described.

The meaning of subss. 1–4 is that the actual words of conveyance must describe the conveying party as "beneficial owner," or "settlor," or otherwise (as intended): see the 4th Sch. to the Act, Forms I., III., and IV. It is not sufficient to recite the nature of his ownership, or object of the deed, and then for him to convey simply. He must be expressed to convey as "beneficial owner," "settlor," or otherwise as the case may require.

Word "convey" not necessary.

It is not necessary, in order that a conveyance may operate under this s., to use the word "convey" or "conveyance." These words include all the operative words "assign," &c., ordinarily used, see s. 2 (v.), and may be used instead of the word "grant," see s. 49 and the schedules to this Act where "convey" is used to pass a fee simple, and s. 57 which enacts that deeds using expressions to the like effect as in the 4th schedule shall be sufficient. Accordingly it is immaterial what word is used; in a conveyance in fee "grant" may be used; in a conveyance under a power "appoint" may be used; and in the case of personal estate "assign" may be used, all these words being equally capable of attracting the covenants in this s.

Any operative word sufficient.

"Purchase for value."

The expression "purchase for value" is not to include a conveyance in consideration of marriage for the reason that the covenant E, *infrà*, by a settlor is a limited covenant. Therefore a person deriving title under a marriage settlement should covenant as to the acts of the settlor in the same manner as he would covenant for the acts of his ancestor if he were conveying as heir at law.

Covenants in voluntary conveyance.

A voluntary conveyance (if it be not a settlement to which covenant (E) is made applicable) still requires an express covenant, if any is intended to be given, but in most cases no covenant would be given.

How far back covenant extends.

If A. takes by conveyance on a sale by B., who takes under a settlement, voluntary or otherwise, made by C., then B. derives title "otherwise than by purchase for value" through C., and in the conveyance by B. to A. the implied covenant by B. would extend to the acts of C. But A. does not derive title "otherwise than by purchase for value"

through B. and consequently not through C., and on a conveyance by A. his implied covenant would extend only to his own acts. This appears clear if we consider that, assuming the settlement voluntary, C. could before the Voluntary Conveyances Act, 1893, have defeated it by conveyance for value before A.'s purchase but not afterwards. The implied covenant therefore extends back only to acts subsequent to the last conveyance for value not being a settlement.

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The words of qualification, "notwithstanding anything," &c., control all four branches of the covenant: *David* v. *Sabin*, 1893, 1 Ch. 523.

Qualification of covenant.

"Omitted": see *David* v. *Sabin*, *sup*.

"Omitted."

As to the vendor's liability for the acts or defaults of persons claiming under him, see *David* v. *Sabin*, *sup*.

Persons claiming under the vendor.

Notice to the purchaser, by mention in the conveyance or otherwise, of defects of title, is not enough to absolve the vendor from liability under the covenants for title: see *Page* v. *Midland Rialway Co.*, 1894, 1 Ch. 11 (over-ruling *Hunt* v. *White*, 37 L. J. Ch. 326); *G. W. R. Co.* v. *Fisher*, 1905, 1 Ch. 316. See also *May* v. *Platt*, 1900, 1 Ch. 616.

Conveyance, "subject as . . . expressed."

Covenant (A) does not apply to money due for paving expenses, where it is only recoverable from the owner personally: *Egg* v. *Blayney*, 21 Q. B. D. 107; (Metropolis Management Amendment Act, 1862); but does apply where it is a charge upon the land: *Re Bettesworth & Richer*, 37 Ch. D. 535 (Public Health Act, 1875); *Stock* v. *Meakin*, 1900, 1 Ch. 683 (Private Street Works Act, 1892), *Re Allen & Driscoll*, 1904, 2 Ch. 226 (Public Health Act, 1875). The charge under the last-mentioned Acts dates from the completion of the works: S. CC.

As to the distinction between the case of damage arising from the breach of a covenant for quiet enjoyment and that arising from breach of a covenant for title; see Dart, 7th ed. 803; 46 Sol. J. 279; 49 *ib.* 346; and as to the measure of damages in the last-mentioned case, see *Turner* v. *Moon*, 1901, 2 Ch. 825; *G. W. R. Co.* v. *Fisher*, *sup.*; and compare *Sutton* v. *Baillie*, *sup.*

Damages for breach.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On conveyance of leaseholds for value, by beneficial owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited,

Validity of lease.

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unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On assignment of leaseholds express covenant by purchaser still required.

The Act does not provide for the covenant of indemnity against rent and covenants by a purchaser on the assignment of leaseholds. The circumstances differ so much that a general covenant could not easily be framed. Moreover the purchaser does not always execute the deed: but see L. T. A. s. 39.

On surrender of leaseholds, express covenant still required.

It would seem that, in a surrender of a lease, there should be either an express covenant by the person who conveys, or an exclusion, under subs. 7, of the covenant implied under clause (B), which assumes the existence of a landlord standing aloof as a third party.

The case of *David* v. *Sabin*, cited on covenant (A), shows the need of taking a covenant on a surrender.

On mortgage by beneficial owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed,

Quiet enjoyment.

S. 7 (C), (D).

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Freedom from incumbrance.

or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Further assurance.

Covenant (C) inserted in a Bill of Sale makes it void: *Ex p. Stanford*, 17 Q. B. D. 259.

Bill of Sale.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage of leaseholds by beneficial owner.

S. 7 (D), (E).

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Covenants for Title.

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Payment of rent and performance of covenants.

On settlement.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and

things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

S. 7 (E), (F).

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It is conceived that "a conveyance by way of settlement" need not, to come within this subs., contain limitations by way of succession; but that it is enough if it disposes of property for the benefit of some other person or some corporation: compare *Re Player*, 15 Q. B. D. 682; *Re Vansittart*, 1893, 1 Q. B. 181; *Re Plummer*, 1900, 2 Q. B. 790, decisions on s. 47 of the Bankruptcy Act, 1883.

Covenants in settlements, old practice as to.

The old practice in settlements was for the settlor to give the ordinary vendor's covenants for title. This can still be done, where the settlement is "a conveyance for valuable consideration," by making him convey as beneficial owner instead of as settlor, and so incorporating covenant (A). The old practice is inconvenient. If a charge be suppressed or accidentally overlooked, the trustees on discovering it become bound to sue the settlor. The amount to be recovered might be such as to leave him penniless and make proceedings in bankruptcy necessary. This cannot be for the benefit of the wife or family, and is an obligation which should not be imposed on trustees. There should be either no covenant for title, or at most this limited covenant (E), which binds the settlor purporting to convey the fee simple, to bar an estate tail (see *Davis* v. *Tollemache*, 2 Jur. N. S. 1181, 1185; *Bankes* v. *Small*, 36 Ch. D. 716), to execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances created before the settlement: *West* v. *Williams*, 1899, 1 Ch. 132, 147; but see *Re Jones*, 1893, 2 Ch. 461.

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof,

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is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Covenant by outgoing trustee.

On a change of trustees the covenant against incumbrances of an outgoing trustee is now of less importance than it was: any wrongful incumbrance being a breach of trust for which there is a remedy independently of the covenant. Before the Act 32 & 33 Vict. c. 46, the covenant was useful as making the breach of trust a specialty debt having a priority: see *Holland* v. *Holland*, 4 Ch. App. 449; nor is it quite useless for that purpose, even now: see n. to s. 59, *inf.* It also, in regard to T. A. 1888, s. 8, leaves more time for an action to be brought against the trustee.

"Party or privy."

"Party or privy": see, on the force of these words, *Hobson* v. *Middleton*, 6 B. & C. 295; *Clifford* v. *Hoare*, L. R. 9 C. P. 362; Sugden, V. & P., 14th ed., 603–4.

"Privy."

The word "privy" does not mean "having knowledge" (which would make the covenant to a great extent an absolute covenant for title), but means participation in some act so as to be bound thereby: see, per Tindal, C.J., *Woodhouse* v. *Jenkins*, 9 Bingh. 441; *Thorne* v. *Heard*, 1894, 1 Ch. 606; Century Dict. tit. "Privity."

On conveyance by direction of beneficial owner.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

Under subs. 1 the covenant implied on the part of any person conveying relates to what he himself conveys. Under this subs. the covenant implied on the part of the person directing applies to what another conveys by his direction. The same result would be attained by making him convey by way of confirmation as beneficial owner.

Old practice as to covenants by tenant for life.

This subs. is intended to apply to a case like that of a sale by trustees under a power by the direction of the tenant for life. Since the S. L. A., the tenant for life will generally be himself the vendor. The old practice was to make the tenant for life covenant

generally as if he were a vendor seised in fee. Latterly the practice has been to confine his covenant to his life estate only, see Dart, 7th ed., 571; 1 Dav. Conv., 5th ed., 97, and a proviso so limiting the covenant and operating under subs. 7 of this s. should be added.

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Implied covenants in conveyance by husband and wife.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

The object of this subs. is to enable covenants on the part of the husband to be incorporated where husband and wife convey.

The wife may convey with consent of the husband, the husband not conveying. Then the covenant is by the wife only, to the effect that notwithstanding anything done by her, &c., or any one through whom she derives title otherwise than, &c. But the general practice is for the wife to convey, and the husband also to convey and to confirm. In that case the wife and the husband should each be expressed to convey as beneficial owner; then, within this subs., she will be deemed to convey by the direction of her husband as beneficial owner, and the three following covenants will be implied:—(1) by the wife as beneficial owner binding, (*a*) if the conveyance is made before 1883, her present separate property, which she is not restrained from anticipating: see *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; (*b*) if the conveyance is made after 1882, but before the 5th of December, 1893, and if she has any such separate property (but not otherwise: see *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661) such present separate property, and also her future separate property which she is not restrained from anticipating: M. W. P. A., s. 1, (3), (4), s. 19; but not property acquired by her when not under coverture: *Pelton Brothers* v. *Harrison*, 1891, 2 Q. B. 422; and (*c*) if the conveyance is after the 4th of December, 1893 (see M. W. P. A., 1893), all her present separate property and, whether she has any present separate property or not, all her future separate property, and all property she may own while discovert, but without prejudice to any restraint on anticipation; (2) by the husband as beneficial owner; and (3) by the husband in the same terms as the covenant implied on the part of the wife, that is in effect, that notwithstanding anything done by her or by any one through whom she derives title otherwise than, &c.

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A married woman conveying under a power.

As to wife's property acquired after 1882

Where a married woman conveys under a power she and her husband may in like manner each be expressed to convey as beneficial owner, then the three covenants above mentioned will be implied. The second of those covenants (being the first of the husband's covenants) will not be of importance, but his second covenant corresponds with the usual one entered into by him in similar cases independently of this Act.

Where the wife, married before 1883, conveys as beneficial owner property acquired beneficially by her after 1882, the concurrence of her husband is no longer necessary, as he takes no interest, and she disposes of it as a *feme sole* (M. W. P. A., s. 5); nor for the same reason is it necessary as to the beneficial interest in any property of a woman married after 1882, *ib.* s. 2.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

A conveyance can still be drawn in the old form. The character in which the conveying party conveys should then not be stated, and covenants can be inserted in express words.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Covenant to surrender may incorporate covenant.

By s. 2 (v.) "conveyance" includes a covenant to surrender. The statutory covenants contained in this s. may therefore be incorporated in the deed of covenant, but they cannot be incorporated in the surrender unless it is under seal. They may also be incorporated in all cases where customary or copyhold lands can be dealt with as freeholds, for instance, where they pass by bargain and sale under a power in a will, or by deed and admittance by virtue of the S. L. A., 1882, or otherwise, or where an equity is conveyed.

Covenant in a lease.

As to the covenants for lessor's title implied by law in a lease, see *Baynes* v. *Lloyd*, 1895, 1 Q. B. 820; 2 Q. B. 610; *Budd-Scott* v. *Daniell*, 1902, 2 K. B. 351; *Jones* v. *Lavington*, 1903, 1 K. B. 253. And as to the usual express limited covenant, see Woodfall, L. & T., 17th ed., 759 *et seq.*

Covenants for Title.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

Benefit of implied covenants in this s. to run with the land.

This subs. makes all covenants implied under this s. run with the land so as to be enforceable by every person interested under the conveyance, as to whose rights, see *David* v. *Sabin*, 1893, 1 Ch. 523, 536–7, 540–1, 545–6; but a person deriving title under the implied covenantee cannot sue on the covenants if no estate passed under the conveyance with which the covenants could run: *Onward Bldg. Society* v. *Smithson*, 1893, 1 Ch. 1. As to a purchaser's right to a chain of covenants, see *Scott* v. *Alvarez*, 1895, 1 Ch. 596, 606.

See further as to covenants, ss. 58–60 and 64.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

Variation of statutory covenants may be made.

This subs. enables provisions to be inserted modifying the statutory covenant in any agreed manner. As so modified it will be equivalent, in effect, for the purpose of running with the land and otherwise, to the simple statutory covenant. A proviso now generally used limiting the covenants for title by a tenant for life is an example of a variation under subs. 7, and is a valid proviso and not repugnant to the covenant: see *Williams* v. *Hathaway*, 6 Ch. D. 544, and n. to subs. 2.

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

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Execution of Purchase Deed.

(2.) This section applies only to sales made after the commencement of this Act.

See s. 2 (v.) (viii.), *sup.*

The s. precludes the questions raised in *Viney* v. *Chaplin*, 4 Drew, 237, 2 D. & J. 468; *Essex* v. *Daniell*, L. R. 10 C. P. 538; and *Ex p. Swinbanks*, 11 Ch. D. 525. It is applied, by L. T. A. 1897, s. 9 (1), to transfers of registered land.

Production and Safe Custody of Title Deeds.

Acknowledgment of right to production, and undertaking for safe custody of documents.

Production and Safe Custody of Title Deeds.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of

inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

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(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

Mortgagor and mortgagee.

It is conceived that where a mortgagor gives an acknowledgment to his mortgagee, it is unnecessary to vary (under subs. 13, *infra*) the provision made by this subs. as to costs and expenses, by expressly giving them to the mortgagee, or adding them to his security. The mortgagee, though liable, in case the deeds get into other hands, to pay the costs and expenses in the first instance, would be entitled to add them to his security as against the mortgaged property, on general principles, if the specific performance of the obligation was required for the purposes of his security: compare *N. P. B. of Eng.* v. *Games*, 31 Ch. D. 582; and see *contrà*, Key & Elphinstone, 8th ed., vol. ii. 61 (d).

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

Legal right to production assimilated to the equitable right.

This s. removes certain difficulties as to covenants for production running with the land, and makes the legal right to production co-extensive with the equitable right, as to which, see *Fain* v. *Ayers*, 2 Sim. & St. 533, Dart, 7th ed. ch. ix. s. 2; ch. xii. s. 6. Also it removes the

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Effect of s. 9.

personal liability of the original covenantor after he has parted with the documents, and transfers that obligation to each subsequent possessor, but for the period only of his possession. This personal liability has sometimes compelled a covenantor to retain documents after he had ceased to be interested in any land affected by them, or else to incur the expense of obtaining, and of procuring the covenantee to accept, a substituted covenant. A person retaining documents is now enabled to give (1) an acknowledgment of the right of production, and (2) an undertaking for safe custody, together or separately. The first, unlike a covenant to the same effect, may safely be given by a trustee or mortgagee. He can always produce the documents while he has possession of them, and he ceases to be liable after he has parted with them. He should only give the acknowledgment and not the undertaking: see n. to subs. 14. An ordinary vendor will be liable to give both in the absence of special contract. As to the right of the vendor to retain documents, see V. & P. A., s. 2, r. 5.

No liability to damages where acknowledgment only given.

Subs. 6 expressly excludes all liability to damages for loss or destruction where an acknowledgment only is given. The liability for damages arises only upon an undertaking under subs. 9.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

Acknowledgment substituted for covenant to produce.

Where by general law, and in the absence of special contract, a person would be bound to give a covenant for production and delivery of copies (as to which see Sug. V. & P., 14th ed., Ch. xi. s. 6, and *Cooper* v. *Emery*, 1 Ph. 388), subs. 8 enables him to give an acknowledgment in place of the covenant, but does not compel him to do so. He still has the option of giving a covenant, an option not likely to be exercised, as the covenant creates a more onerous liability. This s. applies only to liabilities respecting documents incurred after 1881: see subs. 14.

Where a conveyance is made to uses the acknowledgment should, like the old covenant for production, be made to the grantee to uses. The persons interested under the limitations will then, as "claiming any estate, &c., through" that grantee (see subs. 3) be entitled to the benefit of the acknowledgment.

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Where conveyance made to uses.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

Liability under undertaking is on possessor only.

This subs., as compared with the ordinary covenant for production, operates as a relief to the person bound to produce. It makes him liable for damages only while the documents are in his possession. On the other hand, it imposes an additional liability on any person afterwards acquiring possession of the documents, making him liable in damages for loss or destruction, a liability not necessarily devolving on him under the ordinary covenant merely by reason of his receiving the documents from a person who had covenanted for safe custody.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct any inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

Application under acknowledgment or for damages, how made.

Damages for loss of deeds.

An application to the Court under this subs. or under subs. 7 should be by summons: see s. 69 (3).

As to the question of damages, see *Hornby* v. *Matcham*, 16 Sim. 325, and *Brown* v. *Sewell*, 11 Hare, 49. In *James* v. *Rumsey*, 11 Ch. D. 398, the mortgagor was held entitled to an indemnity, but not to compensation.

(11.) An undertaking for safe custody of documents

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shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

See note to subs. 8.

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(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

Whether trustees should give undertaking.

The covenant for production of documents intended to be superseded by this s. imposed two obligations, (1) an obligation to produce, (2) an obligation to keep safe. The first could be enforced by specific performance, but the remedy on the second was damages only. The old practice was that a trustee selling did not give any covenant. Latterly it has been customary for him to give a covenant limited so as to bind himself personally while having possession of the documents, and so as to bind the same, so far as may be, in the hands of other persons, "but so as not to create any further liability," or "so as not to create any liability for damages." With this limitation inserted it is conceived that the part of the covenant as to safe keeping should have been omitted, the limitation of liability being repugnant and void: *Williams* v. *Hathaway*, 6 Ch. D. 544; but this does not seem always to have been attended to in the precedent books. However this may be, the general rule is that a trustee does not covenant except for his own acts, and ought not to be asked to guarantee the safety of documents which might be lost without his personal neglect, as, for instance, by his solicitor on a journey, when properly removing them. In this view trustees ought only to give an acknowledgment under this s. and not an undertaking. If they give an undertaking any damages incurred could not, it is apprehended, in the absence of special provision, be recouped to them out of the part of the trust estate retained: see, however, on the question whether trustees should give the undertaking as well as the acknowledgment, 37 Sol. J., pp. 4, 73, 78. But on the purchase of an estate with deeds bound by an undertaking, the liability would be one attached by law to the estate, and

in a proper case the trustees would be entitled to be recouped any loss. The same principle applies to mortgagees.

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The old practice was to take the covenant for production of documents by a separate deed, and not to include it in the conveyance. On subsequent dealings it was kept off the abstract, and no opportunity was given for making requisitions as to the documents mentioned in the covenant. Having regard to the Act, 22 & 23 Vict. c. 35, s. 24, it is conceived that a solicitor cannot now safely omit giving an abstract of a document of even date with the conveyance commencing a title.

Acknowledgment or undertaking may be included in the conveyance.

Under the C. A., s. 3 (3), when a conveyance becomes a root of title any requisition as to prior documents is precluded, and there is therefore no special reason for giving an undertaking by a separate writing unless the schedule of documents would make the conveyance inconveniently long, but it seems best so to give it, and if so given it can be destroyed when production has ceased to be of importance.

Stamp on an acknowledgment or undertaking.

A separate writing, under hand only, should bear a sixpenny agreement stamp. Though not a document clearly included in the Stamp Act, it might be held to be in effect an agreement.

Expense, by whom to be borne.

An acknowledgment and undertaking being substituted for a covenant, the expense will be borne by the person who would pay for the covenant (see V. & P. A. s. 2, r. 4), but, besides the stamp, the expense will in any case be no more than the mere cost of making out a schedule of documents.

No indemnity required on delivery over.

The liability of a person giving an acknowledgment or undertaking ceases when the documents are delivered over, and attaches to the person receiving them. Therefore no indemnity need be taken on delivery over, but it is conceived that they must be properly delivered over, that is to say, to a person having an interest in the property to which they relate.

S. only applies to persons actually having possession of documents.

The acknowledgment or undertaking must be given by a person who retains the documents, *i.e.* who actually has possession of them. Therefore where, as sometimes happens on a sale of property in mortgage, the mortgagor and mortgagee are required to place themselves under an obligation for production, the obligation by the mortgagee being limited to the period during which he has possession, he alone can give an acknowledgment. The mortgagor does not retain the deeds, and his obligation is, not to produce, but to procure production, and, if required, must be provided for by covenant in the old form: *Re Pursell & Deakin*, W. N., 1893, 152. It is wrong to make the mortgagor in such a case give an undertaking for safe custody. His undertaking has no operation under this Act. It operates as an unqualified ordinary contract for safe custody, and renders him liable for loss or destruction of the deeds after he has ceased to have any interest in them, and the person to whom it is given has not the benefit of subs. 10 of this s.

Production by mortgagee.

Under s. 16, *inf.*, a mortgagee, under a mortgage made after 1881, is bound to produce the deeds in his custody or power to any person entitled to redeem, and to permit him to take copies or abstracts.

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Custody of deeds by equitable tenant for life.

As to the terms on which an equitable tenant for life, as between himself and his trustees, is entitled to custody of title deeds, see *Re Burnaby*, 42 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369; *Re Newen*, 1894, 2 Ch. 297.

III.—LEASES.

LEASES.

Rent and benefit of lessee's covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

Agreement for a lease.

Whether this section applies to an agreement for a lease, of which specific performance could be obtained, *qu.*, *Manchester Brewing Co.* v. *Coombs*, 1901, 2 Ch. 608, 619.

Registered chargee.

It is doubtful whether a registered chargee not having any estate could take advantage of this s. The provisions of the L. T. A., s. 25 only enable him to enter for limited purposes.

"Benefit of... condition of re-entry."

It seems a conveyance of the reversion does not pass the right to forfeit for condition already broken: *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; *Jenkins* v. *Jones*, 9 Q. B. D. 128, 131; *Cohen* v. *Tannar*, 1900, 2 Q. B. 609; but see Challis, R. P. p. 67 (n), 2nd ed.

Beneficial owner as well as legal reversioner entitled to sue.

This s. gives to the "person entitled to the income," that is, the beneficial owner, as well as the legal reversioner, the right to sue. It also gives a mortgagee in possession the right to sue on the lessee's covenants in a lease made under s. 18 of this Act by the mortgagor: *Municipal &c. Building Soc.* v. *Smith*, 22 Q. B. D. 70.

As to some of the difficulties provided against by this s. see *Greenaway* v. *Hart*, 14 Com. B. 340; *Yellowly* v. *Gower*, 11 Exch. 274.

As to the right of one tenant in common of the reversion to sue alone, see *Roberts* v. *Holland*, 1893, 1 Q. B. 665.

Apportionment.

And as to apportionment of rent and covenants on severance of the reversionary estate, by assignment or surrender, see *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48; *Baynton* v. *Morgan*, 21 Q. B. D. 101, and on appeal, 22 Q. B. D. 74. These cases seem to lead to the conclusion that where the reversion is severed and the rent is properly apportioned the lessee is legally bound by such apportionment though he has not assented, and then s. 12, *post*, apportions the condition of re-entry.

As to the cases in which the benefit of covenants by lessees ran with the reversion prior to this Act, see *Spencer's Case*, and notes, 1 Smith, L. C., 11th ed., 55 *et seq.*

Lease of easement

And as to the case of the grant of a mere easement for a term, see *Martyn* v. *Williams*, 1 H. & N. 817; *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Lord Hastings* v. *N. E. Ry. Co.*, 1899, 1 Ch. 656; 1900, A. C. 260.

Obligation of lessor's covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Lessor's covenants in leases under powers.

This s. makes legally binding on the successors in title of a person who grants a lease under a power, all covenants which, as against the remainderman, the grantor has power to enter into; see *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522, where, however, this s. was not expressly referred to.

Covenants running with the reversion.

This s. does not alter the old law as to the class of covenants the burden of which run with the reversion: *Davis* v. *Town Properties &c.*, 1903, 1 Ch. 797.

A lessor who has assigned his reversion remains liable upon his express covenants, running with the reversion: *Stuart* v. *Joy*, 1904, 1 K. B. 362.

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As to the cases in which the obligation of covenants by lessors ran with the reversion before this Act, see *Spencer's Case*, and notes *ubi sup.* As to a covenant for renewal, see *Muller* v. *Strafford*, 1901, 1 Ch. 54, and the Irish cases there cited. As to the obligation of covenants running with the land, generally, see note to s. 58; and *Eccles* v. *Mills*, 1898, A. C. 360.

This s. necessarily does not apply to cases where the covenants are not severable in their nature, or are not attributable to particular parts of the demised property.

Principle of 32 Hen. 8, c. 34, extended to leases binding the legal reversioner.

The two preceding ss. effect a considerable extension of the principle of the Act 32 Hen. 8, c. 34, whereby the benefit of a covenant was annexed to the reversion: see *Lord Hastings* v. *N. E. Ry. Co.*, 1898, 2 Ch. 674; 1899, 1 Ch. 656; 1900, A. C. 260. In order to be within that Act, the covenant must have been entered into with the owner of the legal reversion, so that in a lease under a power reserved to the mortgagor by the mortgage deed, a covenant by the lessee with the mortgagor did not run, but was a covenant in gross, the mortgagor not being the legal reversioner. But the Act 8 & 9 Vict. c. 106, s. 5, enabled the lessee to covenant with the mortgagee though not a party to the lease, so that a covenant properly framed, that is with the mortgagor, "and other the person entitled to the reversion," would after that Act run with the legal reversion. Now, under s. 10 of this Act, wherever there is a legal reversion, that is, where a lease is made by means of an ordinary power or a statutory power as under s. 18 of this Act, or under the S. L. A., 1882, enabling a legal term to be carved out of the reversion, the lessee's covenants, whether so expressed or not, are annexed to and run with the reversion, and are no longer covenants in gross.

So under s. 11 the covenants of a lessor who has power to bind the reversionary estate, will run with it, and bind the reversioner, though the lessor be tenant for life only, or, as mortgagor, be entitled only to an equitable interest.

Where a mortgagor, not having power to bind the mortgagee, grants a lease, no legal term is created, and there being consequently no reversion, ss. 10, 11, and 12 do not apply. If, however, the mortgagee reconvey to the mortgagor, the lease becomes good: see notes to *Spencer's Case, sup.*, 95–97; *Webb* v. *Austin*, 7 M. & Gr. 701; *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Cuthbertson* v. *Irving*, 6 H. & N. 135; but the lease is not binding on a purchaser from both unless the sale is expressly subject thereto: *Downe* v. *Thompson*, 9 Q. B. 1037.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every

other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

Application of this s.

The 22 & 23 Vict. c. 35, s. 3, provides in favour of an assignee (but not of the lessor), for the apportionment of conditions of re-entry where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned. This s. of the present Act provides for the apportionment of every condition in a lease, which is in its nature apportionable, and includes the case of the avoidance or cesser in any manner of the term granted by the lease as to part only of the land comprised therein. As to the old law, see Brooke's Abridgment "Conditions," 193; *Winter's Case*, Dyer, 308 b.; *Britman* v. *Stanford*, Owen, 41.

On sub-demise title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

This s. is supplementary to s. 3 (1), and to the V. & P. A., s. 2, r. 1.

What title to be shown by leaseholder selling or leasing.

The effect of this s., together with s. 2, r. 1, of the V. & P. A., on a contract to grant a lease, is as follows:—

By the V. & P. A., under a contract to grant a lease for a *term of years*, the intending lessee—

(1) Cannot, whether the intending lessor be freeholder or leaseholder, call for the title to the freehold,

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(2) But can, if the intending lessor be a leaseholder, call for his lease and the title thereto.

By the above s. 13 the intending lessee

(3) Cannot, where the intending lessor holds by under-lease, call for the title of the superior leasehold reversion on such under-lease.

In contradistinction to a freeholder, the leaseholder is still left under liability to show his own lease and his title thereto: see *Gosling* v. *Woolf*, 1893, 1 Q. B. 39; better reported, 41 W. R. 106; 68 L. T. 89. This is in accordance with the usual practice, though probably a lessee at a rack rent seldom calls for his lessor's title: see *Clayton* v. *Leech*, 41 Ch. D. 103, 105, 106. The freeholder almost invariably bars himself from showing his own title on granting a lease, but a leaseholder does not generally do so.

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Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

C. A., 1892.

This s. must be read with C. A., 1892, ss. 2–5.

As to service of notice, see s. 67, and *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.

"Or otherwise," *i.e.* by peaceable entry: *Re Riggs*, 1901, 2 K. B. 16.

Contents of notice.

The notice should so specify the breach as to show the tenant what to do to remedy it: *Fletcher* v. *Nokes*, 1897, 1 Ch. 271; *Re Serle*, 1898, 1 Ch. 652; *Horsey Estate, Ltd.* v. *Steiger*, 1899, 2 Q. B. 79. And a notice, vague as to some breaches, but specific as to others, is bad: *Re Serle*; but a notice is not bad because some of the alleged breaches have never taken place: *Pannell* v. *City of London Brewery Co.*, 1900, 1 Ch. 496.

A reasonable interval must elapse after service of notice, and before action: *Horsey Estate, Ltd.* v. *Steiger*, *sup.*

Reversion in mortgage.

Where the lease was before the Act and there was a legal mortgage of the reversion, it was held that the notice under this s. must be

given by the mortgagee : *Matthews* v. *Usher*, 1900, 2 Q. B. 535 ; but, if the lease is made after the Act, either before the mortgage, or by the mortgagor under s. 18, then the mortgagor while in possession can enforce the right of re-entry (s. 10), and is, it is conceived, the proper person to give the notice under this s.

Continuing breach.

Where breach continues—*e.g.* of a covenant to repair—an acknowledgment of the tenancy after notice does not render a fresh notice necessary : *Penton* v. *Barnett*, 1898, 1 Q. B. 276. A notice stating the breach of a covenant to erect buildings within a specified time, but omitting to state the breach of a covenant to keep the buildings in repair is insufficient, if the breach of the building covenant has been waived by acceptance of rent : *Jacob* v. *Down*, 1900, 2 Ch. 156 ; but the lessor could rely on the continuing breach of the repairing covenant on giving notice thereof: S. C.

Assignee of lease.

An assignee of a lease is entitled to the benefit of this s. (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348), but not an under-lessee as against the superior landlord : *Burt* v. *Gray*, 1891, 2 Q. B. 98 ; *Cresswell* v. *Davidson*, 56 L. T. 811 ; see now, however, C. A., 1892, s. 4.

Agreement for a lease.

This s. does not apply to an agreement for a lease where there is no present title to specific performance : *Ayling* v. *Mercer*, W. N., 1885, p. 166 ; *Swain* v. *Ayres*, 20 Q. B. D. 585, 21 *ib.* 289 ; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220 ; but it does apply where there is such a title : *Swain* v. *Ayres*, 21 Q. B. D. at pp. 292–3 ; *Lowther* v. *Heaver*, 41 Ch. D. 248, pp. 260, 261 ; *Strong* v. *Stringer*, W. N., 1889, p. 135 ; and see C. A., 1892, s. 5.

Tenancy agreement.

Semble this s. even as extended by the C. A., 1892, s. 5, does not apply to a mere tenancy agreement : *Charrington & Co.* v. *Camp*, 1902, 1 Ch. 386.

Service of notice.

A notice under this s. is sufficiently served on an assignee if addressed to the original lessee and all others whom it may concern and served on the occupier : *Cronin* v. *Rogers*, 1 Cab. & Ell. 348 ; and see s. 67.

Informal notice.

In *North London Land Co.* v. *Jacques*, 32 W. R. 283, W. N., 1883, 187, the lessor's notice was informal in not requiring the lessee to remedy the breach, and though judgment had been actually recovered in an undefended action against the lessee the equitable mortgagees of the lessee were held entitled to relief ; but in *Lock* v. *Pearce*, 1893, 2 Ch. 271, it was held that if the lessor does not want compensation, he is not bound to ask for it.

Amount and recovery of compensation.

The compensation claimed is measured by the breach, only where the breach cannot be remedied. No separate remedy is given for recovering the compensation claimed, so that a landlord giving notice to repair under a covenant to repair cannot under this s. recover his surveyor's charges or his solicitor's costs, see *Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 542, and if the notice is complied with there is no breach of covenant ; but see now C. A., 1892, s. 2.

Surveyor's charges.

Receiver.

As to the appointment of a receiver to preserve the property *pendente lite*, see, *Charrington & Co.* v. *Camp*, *sup.*

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(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

"The Court."

"The Court," *i.e.* the High Court: see *Lock* v. *Pearce*, 1893, 2 Ch. 271.

Lessee's action.

If the lessor's action is in Q. B. D., the lessee can apply in that action, notwithstanding s. 69 (1): *Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254.

If there is no action by the lessor, or the lessor's action is in the County Court, the lessee's application must be by action in the Ch. D. of the High Court instituted by writ, not by originating summons: *Lock* v. *Pearce, sup.*

Relief.

The tenant can only obtain relief under this s. before the landlord has re-entered: *Quilter* v. *Mapleson*, 9 Q. B. D. 672, 675, 676; *Rogers* v. *Rice*, 1892, 2 Ch. 170; but if he has applied for relief before re-entry, that is enough: *Lock* v. *Pearce*, 1892, 2 Ch. 328, 332; and it seems doubtful if he can recover damages; see *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220. Relief was refused in *Scott* v. *Brown*, W. N., 1884, 209, 51 L. T. 746; see also *Lock* v. *Pearce, sup.* It was granted upon terms in *Quilter* v. *Mapleson, sup.*; in *North London Land Co.* v. *Jacques*, 32 W. R. 283, W. N., 1883, 187; in *Bond* v. *Freke*, W. N., 1884, 47; in *Mitchison* v. *Thomson*, 1 Cab. & Ell. 72; and in *Batson* v. *London S. Board*, 69 J. P. 9; and the time fixed by the order of relief for complying with the terms was subsequently extended in *Gaze* v. *London Drapery Stores*, 44 Sol. J. 722.

What relief before this Act.

Before this Act no relief could have been obtained against the right of re-entry for breach of covenant in a lease, except in the case of a covenant for payment of rent: *Hill* v. *Barclay*, 18 Ves. 56; *Bracebridge* v. *Buckley*, 2 Price, 200; *Nokes* v. *Gibbon*, 3 Drew. 681; *Howard* v. *Fanshawe*, 1895, 2 Ch. 581; or except in cases of accident or surprise: *Hill* v. *Barclay*, at p. 62; or under special circumstances enabling a Court of Equity to grant relief: *Bamford* v. *Creasy*, 3 Giff. 675; *Bargent* v. *Thomson*, 4 Giff. 473; *Hughes* v. *Metrop. R. Co.*, 2 App. Cas. 439; *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; *Eastern*

Telegraph Co. v. *Dent*, 1899, 1 Q. B. 835. Under 22 & 23 Vict. c. 3, ss. 4–9, Courts of Equity had power to grant relief in certain cases of forfeiture for omission to insure against fire. That power was extended to Courts of Common Law by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2. These enactments are repealed by this Act (see subs. 7 of this s.); but by subs. 8 the relief against forfeiture for non-payment of rent, which extends to an under-lessee (*Doe* v. *Byron*, 1 Com. B. 623), is left untouched. As to this relief at common law, see the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 212, and the C. L. P., 1860, 23 & 24 Vict. c. 126, s. 1.

How damages are to be ascertained.

The Act gives no guide for estimating the penalty to be imposed on the lessee: and see *Lepla* v. *Rogers*, 1893, 1 Q. B. 31. Where there has been a breach of a covenant to insure, but no loss, it is difficult to say what sum should be paid to the landlord. The probability is that the only penalty will be costs: *Quilter* v. *Mapleson*, 9 Q. B. D. 678.

The measure of damages for non-repair is not necessarily the same under an under-lease as under a lease: *Ebbetts* v. *Conquest*, 1895, 2 Ch. 377; 1896, A. C. 494.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

See also C. A., 1892, s. 5, and as to rent charges, s. 44 *infrà*.

"Assigns of lessee."

"Assigns of lessee"; *i.e.* assigns of a legal estate: see *Friary &c. Breweries* v. *Singleton*, 1899, 1 Ch. 86; 2 Ch. 261; *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267.

Sub-lessee's right to relief.

An under-lessee has under this s. no right to relief against the superior landlord: *Nind* v. *Nineteenth Century Bldg. Society*, 1894, 2 Q. B. 226—approving *Burt* v. *Gray*, 1891, 2 Q. B. 98; *Cresswell* v. *Davidson*, W. N., 1887, 86; 56 L. T. 811. In *Doe* v. *Byron*, 1 Com. B. 623 (which was not cited in either of the three last-mentioned cases), it was held that an under-lessee was a "tenant" within the remedial clause against ejectment for non-payment of rent, in 4 Geo. 2, c. 28, s. 3; but see now C. A., 1892, s. 4.

(4.) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture

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accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

See now C. A., 1892, s. 2 (2), (3), as to forfeiture on bankruptcy or taking in execution; s. 3 as to assignment, &c.

Covenant against assignment.

A covenant against assignment is only broken by a legal assignment, and not by a declaration of trust, and delivery of possession: *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267; nor is it broken by an assignment of part of the premises, where the covenant omits the words "or any part thereof": *Grove* v. *Portal*, 1902, 1 Ch. 727; and see *Daly* v. *Edwardes*, 82 L. T. 372, 83 *ib.* 548.

The lessee's being adjudicated bankrupt on his own petition does not operate as a breach of his covenant not to assign: *Re Riggs*, 1901, 2 K. B. 16.

Consent of lessor to assignment, &c.

As to the necessity of applying for the lessor's consent, where required, even though it cannot be arbitrarily withheld, and no valid objection could be taken to the proposed assignment or underlease, see *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent*, 1899, 1 Q. B. 835.

A covenant not to assign without the lessor's consent applies to a reassignment to the original lessee: *McEacharn* v. *Colton*, 1902, A. C. 104.

Mortgage.

A covenant against assigning or underletting is broken by an assignment or sub-demise by way of mortgage: *Serjeant* v. *Nash*, 1903, L. J. K. B. 630.

See also as to this covenant, *Harman* v. *Ainslie*, 1904, 1 K. B. 698, and 44 Sol. J. 39.

Covenant against underletting.

An agreement to give possession to a purchaser pending completion, with a proviso for redelivery of possession if purchase not completed, is not an underletting: *Horsey Estate, Ltd.* v. *Steiger*, 1899, 2 Q. B. 79.

A condition against assignment for the benefit of creditors is not a condition against "disposing of the land leased": *Gentle* v. *Faulkner, sup.*

Forfeiture.

A condition for forfeiture on bankruptcy refers only to the bankruptcy of the person for the time being possessed of the term: *Smith* v. *Gronow*, 1891, 2 Q. B. 394; as to this condition, see also, *Ex p. Gould*, 13 Q. B. D. 454.

Disposing of land leased.

Bankruptcy.

As to the meaning of "bankruptcy," see s. 2 (xv.), and *Horsey Estate, Ltd.* v. *Steiger, sup.*; *Fryer* v. *Ewart*, 1902, A. C. 187. A proviso for re-entry, if the lessees, being a company, should enter into liquidation, applies to the case of a solvent company going into voluntary liquidation for the purpose only of reconstruction or amalgamation: S. CC.

That a covenant or condition against assigning, &c., does not ordinarily relate to dealings by sub-lessees, see *Williamson* v. *Williamson*, 9 Ch. 729; *Haywood* v. *Silber*, 30 Ch. D. 404; and compare *Bryant* v. *Hancock*, 1898, 1 Q. B. 716.

As to under-lessee's right to relief, under C. A. 1892, s. 4, in the cases excepted by this subs., see *Imray* v. *Oakshette*, 1897, 2 Q. B. 218.

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

As to the meaning of "mining lease," see s. 2 (xi.).

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

Protection of purchaser of leaseholds against forfeiture for non-insurance.

The repeal by this subs. of s. 8 of 22 & 23 Vict. c. 35, does away with the special relief given in respect of insurance to a purchaser of a leasehold, and places him in the same position as his vendor in respect to relief generally against forfeiture. The Court would scarcely enforce a forfeiture against a purchaser without notice, or award damages or enforce a penalty against him, and he thus appears practically in as good a position in respect to insurance as under the repealed s. The case of *Ex p. Gorely*, 4 De G. J. & S. 477, rendered s. 7 of the same Act no longer necessary: but see the comments on that case in *Westminster Fire Office* v. *Glasgow Provident &c. Society*, 13 App. Ca. 699.

Right of purchaser to benefit of policy.

On a contract for sale of the fee simple of a house the benefit of an insurance against fire does not pass to the purchaser unless under express terms in the contract: *Rayner* v. *Preston*, 14 Ch. D. 297, 18 *ib.* 7, and the risk of fire is the purchaser's risk from the date of

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the contract; and as to repayment of insurance money, see *Castellain* v. *Preston*, 11 Q. B. D. 380. But in the case of a leasehold house where the lease contains a covenant to insure, the vendor is bound to perform all covenants up to the time for completion, and if the house is burnt in the meantime the money must be applied in rebuilding: compare *Newman* v. *Maxwell*, 80 L. T. 681. On completion, the purchaser must either take over the old policy or effect a new policy; but the landlord would be entitled to have the money under the old policy applied in rebuilding, in which case the benefit of it passes to the purchaser. And see 14 Geo. III. c. 78, s. 83.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Forfeiture, &c., for non-payment of rent.

As to forfeiture and relief against forfeiture for non-payment of rent, see Woodfall, L. & T. 17th ed., 356, 376; *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

Relief of underlessee.

Relief can be given under s. 4 of the C. A., 1892, to an underlessee against a forfeiture of the head lease for non-payment of rent: *Gray* v. *Bonsall*, 1904, 1 K. B. 601.

Question of good title not altered,

This s. does not affect the principle of *Darlington* v. *Hamilton*, Kay, 550, that a good title is not shown to property held by underlease, but subject, together with other property, to covenants, with right of re-entry, &c., in the head lease: see *Cresswell* v. *Davidson*, W. N. 1887, p. 86; 56 L. T. 811; nor the rule in *Hodgkinson* v. *Crowe*, 10 Ch. 622, that a proviso for re-entry, except for non-payment of rent, is not an "usual or customary" clause; *Re Anderton & Milner*, 45 Ch. D. 476.

nor extent of "usual" proviso for re-entry.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

MORTGAGES.

IV.—MORTGAGES.

The following is a summary of the powers conferred on mortgagors and mortgagees by this Act and made incident to their estates, unless a contrary intention is expressed, except as to the first two powers, (i.) and (ii.), which apply notwithstanding any stipulation to the contrary:—

Powers of mortgagor conferred by this Act.

A mortgagor

(i.) May require the mortgagee, not being or not having been in possession, to transfer instead of reconveying, and to assign the debt: C. A., s. 15;

(ii.) May inspect and take copies of title deeds: s. 16.

(iii.) May redeem one mortgage without redeeming any other: s. 17;

(iv.) May have an order for sale in an action for redemption or sale: s. 25;

Mortgagor in possession.

(v.) May when in possession make or agree to make agricultural or occupation leases not exceeding twenty-one years, and building leases not exceeding ninety-nine years: s. 18 (1), (17).

(i.) and (iv.) are retrospective, (ii.) is not; (iii.) applies where the mortgages, or one of them, are or is made after 1881; (v.) is not retrospective, except by agreement.

Powers of mortgagee.

A mortgagee under a *deed* made after 1881

(vi.) May when the mortgage money has become due sell or concur in selling: ss. 19 (i.), 20, 21;

(vii.) May insure: ss. 19 (ii.), 23;

(viii.) May appoint and remove a receiver: ss. 19 (iii.), 24;

(ix.) May give receipts for purchase and other moneys and securities: s. 22;

(x.) May after his power of sale has become exercisable recover the title deeds, except against persons having prior claims: s. 21 (7);

Mortgagee in possession.

(xi.) May when in possession exercise the like powers of leasing or agreeing to lease as a mortgagor in possession; see (v.) *supra*; s. 18 (2), (17);

(xii.) May when in possession cut and sell timber: s. 19 (iv.);

A mortgagee, whether the mortgage is before or after 1881,

(xiii.) May obtain an order for sale in an action for foreclosure or redemption: s. 25 (2).

Of the above (xiii.) is retrospective, (vi.) to (x.), and (xii.) are not; (xi.) is not retrospective except by agreement.

A second or subsequent mortgagee, as being a person entitled to redeem (see s. 2 (vi.))

(xiv.) May also exercise powers (i.) to (iv.).

Devolution of mortgage estates on death.

(xv.) On the death of a sole mortgagee dying after 1881 the estate (except copyhold or customary land to which he has been admitted) devolves on his personal representatives, notwithstanding any devise in his will: s. 30.

Obligation on mortgagee to transfer instead of re-conveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

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See s. 2 (vi.) *suprd.* This s. must be read with C. A., 1882, s. 12.

When transfer of an equitable charge necessary.

This s. includes an equitable as well as a legal mortgage. Though a second mortgage, or any other equitable charge, is discharged by mere payment by the owner of the equity of redemption, and no re-conveyance is necessary, yet it is not so discharged if paid by another person, and if so paid, a transfer can be required under this s.; see *Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506. But *qu.* if the s. applies to a Building Society mortgage: *Re Rumney & Smith*, 1897, 2 Ch. 351.

Redemption by tenant for life.

A tenant for life who has obtained an order to redeem on terms which prevent interest and further costs running up against the remainderman, will be held to those terms, and cannot under this s. require transfer to a third person: *Alderson* v. *Elgey*, 26 Ch. D. 567; and the words "the terms" in the subs. mean "the terms" generally, not merely as to the amount of money payments: see S. C. at p. 573.

Transfer pending foreclosure action.

It has been doubted whether, in a foreclosure action, a transfer, under this s., to a party outside the suit should be allowed: *Smithett* v. *Hesketh*, 44 Ch. D. 161; but the s. expressly gives the right to have a transfer made to *any third* person, the object being that if the subsequent incumbrancer could not provide money to take a transfer and stop foreclosure he might procure some one else to do so, otherwise the s. is practically useless.

For the rights under this s., of successive incumbrancers and the mortgagor, as between themselves, see C. A., 1882, s. 12, and *Teevan* v. *Smith*, 20 Ch. D. 724.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

Why mortgagee in possession excepted.

The reason for excepting a mortgagee "being or having been in possession" (see *Re Prytherch*, 42 Ch. D. 599; *Hall* v. *Heward*, 32 *ib.* 435; *Gaskell* v. *Gosling*, 1896, 1 Q. B. 669, 691) is, that once having taken possession he remains liable for all that he might but for his wilful default have received, and also liable in respect of working minerals and other matters, and remains liable after transfer for the acts and defaults of the transferee, except where the transfer is directed by the Court: *Hall* v. *Heward, sup.* Having once gone into possession he remains liable though he afterwards gives up possession: see *Re Prytherch, sup.* (except in the case of a second or subsequent mortgagee, who might go into possession and be ousted by a prior mortgagee). Consequently, though the request of the mortgagor to transfer might operate as a release by him, the liability to mesne incumbrancers would still continue.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

In applying this and the two following ss. it must be remembered that mortgagor includes any person deriving title under the original mortgagor or entitled to redeem: s. 2 (vi.); *Teevan* v. *Smith*, 20 Ch. D. 724, 730.

Mortgagor includes second mortgagee.

The decisions cancelled by this s. are *Smith* v. *Green*, 1 Coll. 563; *Dunstan* v. *Patterson*, 2 Pb. 345; and others referred to in Fisher, Mortg., 5th ed., 934 (e).

Decisions cancelled.

This s. appears to give a specific right to have a transfer to a nominee, and therefore no other person besides the mortgagee who is required to transfer need be a defendant. The nominee takes the risk of settling the account of what is due. If other mortgagees prior to the plaintiff are required to be defendants an offer must be made to redeem them also, and then the principal object of the enactment, namely, to buy out a mortgagee who insists on foreclosure or sale, is not attained.

Specific right to transfer.

The effect of this s. taken with s. 12 of the C. A., 1882, seems to be to put an end to the old rule that a puisne incumbrancer, though entitled to redeem those above him, cannot do so without foreclosing those below him: see *Ramsbottom* v. *Wallis*, 5 L. J. N. S. Ch. 92; *Rhodes* v. *Buckland*, 16 Beav. 212; *Teevan* v. *Smith*, 20 Ch. D. 724, 729; Fisher, Mort. 5th ed., 694–5; and to deprive a first mortgagee of his right to retain his security unless the estate is to be entirely cleared of its incumbrances from first to last.

Effect on parties to redemption suit.

The mode of enforcing the right given by this s. will be (1) by an action to redeem, in which the mortgagee will be directed to transfer instead of re-conveying, and on refusal there will be the same remedy as on refusal to re-convey: see *Everitt* v. *Automatic Weighing Machine Co.*, 1892, 3 Ch. 506; (2) in case of a sale, by payment of the amount of the incumbrance into Court under s. 5, when on refusal to transfer a vesting order can be made under that s. This s. is retrospective.

How rights under this s. enforced.

Retrospective.

Though a first mortgagee may transfer he must not join in conveying, so as to defeat a second mortgagee of which he has notice, otherwise he will be liable to the second mortgagee to the extent of the balance of the purchase-money: *West London Commercial Bk.* v. *Reliance Build. Soc.*, 27 Ch. D. 187; 29 *ib.* 954, and compare *Corbett* v. *National Provident Institution*, 17 T. L. R. 5.

First mortgagee must not prejudice second mortgagee.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Power for mortgagor to inspect title deeds.

(2.) This section applies only to mortgages made after

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the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See first n. to s. 15 (3); and as to deeds since the Act, subsidiary to a mortgage before the Act, *Burn* v. *London &c. Coal Co.*, W. N., 1890, 209.

As to the mortgagor's remedies against the mortgagee for loss of or damage to documents of title in the mortgagee's custody, see *Gilligan* v. *National Bank*, 1901, 2 Ir. R. 513.

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Cases affected.

As to the decisions affected by this s., see Coote, Mortg. 7th ed., ch. 43; *Minter* v. *Carr*, 1894, 2 Ch. 321 (on Appeal, 1894, 3 Ch. 498); *Pledge* v. *Carr*, 1894, 2 Ch. 328; 1895, 1 Ch. 51; 1896, A.C. 187.

The s. does not apply where there are several mortgages on the same property, though one of them comprises other property: *Re Salmon*, 1903, 1 K. B. 147.

Equity of redemption altered.

The words "seeking to redeem" are general, and apply to the case of a mortgagor or subsequent incumbrancer giving notice to pay off as well as to the case of a redemption suit, or of a payment under an order in a foreclosure suit. Thus in the absence of agreement to the contrary, an equity of redemption arises in the mortgagor free from the right to consolidate. He is put in the same position as if he were another mortgagor, consequently the surplus proceeds of a sale (s. 21 (3)) under one security cannot be applied to make good the deficiency of another security.

How consolidation may still arise.

Under this s. consolidation of mortgages can only arise by express contract. It does not in terms repeal any previously existing rule of law, but it confers on the mortgagor a right in opposition to a previously existing rule, and at the same time permits him to waive that right by contract. The result, it is conceived, is to substitute consolidation by contract of the parties in place of consolidation by rules of equity, so that where a contract is not effectual the right to consolidate does not

arise. The contract in effect gives, in certain cases, a further charge on other property, and is effectual only where the further charge would be effectual. Thus if A. purchase the equity of redemption of two estates, each from a different vendor, each estate being mortgaged to the same mortgagee, neither vendor was ever in a position to give a further charge on the other estate to his mortgagee, and there can be no consolidation of the two mortgages: see also *Bird* v. *Wenn*, 33 Ch. D. 215.

In what cases there will be no consolidation.

Where an equitable mortgage, which does not exclude the operation of this s., contains a covenant to execute a legal mortgage with such provisions as the mortgagee may require, the mortgagee is not entitled to a legal mortgage containing a clause excluding this s. as that would enlarge the subject-matter of the security: *Farmer* v. *Pitt*, 1902, 1 Ch. 954.

Covenant to execute legal mortgage.

Where this s. is excluded, a mortgagee does not lose his right to consolidate by giving notice under s. 20 to pay off one of the mortgages in order to acquire a power of sale: *Griffith* v. *Pound*, 45 Ch. D. 553.

Notice to pay off one mortgage.

The costs of an action to foreclose two estates separately mortgaged to the same mortgagee by the same mortgagor to secure separate sums, must be apportioned rateably between the two properties: *De Caux* v. *Skipper*, 31 Ch. D. 635, overruling *Clapham* v. *Andrews*, 27 Ch. D. 679.

Costs of foreclosure of two separate mortgages.

The effect of subs. 3 is to reserve to a mortgage made before the commencement of the Act its old right in equity to become consolidated with another mortgage, also made before the commencement of the Act.

Effect of subs. 3.

In ordinary cases the mortgagee will be content to rely on the one security taken by him as being sufficient, and will not reserve the right to consolidate. In special cases, as loans to builders, where it is intended to make numerous advances, the right to consolidate will be reserved. Where the contract is for a single loan on specific property, there can be no more obligation on the solicitor of the lender to obtain a further charge on other property contingent merely on its becoming vested in his client as mortgagee, than to take a charge on all other present and future property of the mortgagor.

Leases.

Leases.

18. (1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Leasing powers of mortgagor and of mortgagee in possession.

"Land" in this Act includes incorporeal hereditaments; s. 2 (ii.) Consequently a lease by the mortgagor of part of the mortgaged.

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property with sporting rights over the rest, which had been severed before the mortgage, was held good as against the mortgagee: *Brown* v. *Peto*, 1900, 2 Q. B. 653, in which case the question whether the power conferred by this s. extends to an incorporeal hereditament, although unsevered until the making of the lease, was left open; S. C. p. 665.

Lease by mortgagor in possession and mortgagee.

Where this s. is not excluded, a lessee under a lease by the mortgagor in possession and the first mortgagee holds under the better title, viz. that of the mortgagor, and is bound by a covenant, of which he has notice, entered into by the mortgagor with a second mortgagee: *John Brothers* v. *Holmes*, 1900, 1 Ch. 188, in which case, however, the point does not seem to have been taken that the lease could not have been granted under this s. by the mortgagor in possession alone, as a fine was taken (see subs. 6).

Light.

The lease may operate to confer rights of light, &c., over adjoining land, at least so far as the law gives a right of light to a lessee: *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522; and compare *Born* v. *Turner*, 1900, 2 Ch. 211.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

The prior incumbrancers mentioned in this subs. are those becoming such after the commencement of the Act, but by agreement incumbrancers who became such previously may be included (see subs. 16).

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

Occupation lease.

As to an "occupation lease" of an incorporeal hereditament, see *Brown* v. *Peto*, *sup.*

See definition of building lease, s. 2 (x.).

As to mining lease.

A mining lease is not authorized by this s., as it involves an abstraction of part of the security, but it can be brought within this s. by agreement: see subs. 14.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

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What is a lease in possession.

A grant of a new lease to the lessee in possession under an existing lease operates as a surrender in law of the existing lease, and is therefore (if no underlease be subsisting) a lease in possession: Sugd. on Pow. 8th ed., 777; Farwell on Pow. 2nd ed., 616; and see *Wallis* v. *Hands*, 1893, 2 Ch. 75. Whether this will be so if an underlease is subsisting seems doubtful: see 4 Geo. 2, c. 28, s. 6; *Eccl. Commrs.* v. *Treemer*, 1893, 1 Ch. 166; Farwell on Pow., 617. Having regard to the latter part of the s. last mentioned, the condition of re-entry required by subs. 7 of this s. would not be effective, where the new lease is at a higher rent. But if the existing lease was granted before the mortgage or granted after the mortgage under this s., the mortgagor has not the legal reversion, and the concurrence of the mortgagee to accept the surrender seems necessary. In this respect the surrender of a lease of mortgaged property stands on a different footing from the surrender of a lease of settled land. A tenant for life, equitable as well as legal, of settled land, has a statutory power to accept a surrender: see S. L. A., s. 13 and n. It may be said that, the mortgagor having power to grant a legal term, that term when granted necessarily operates as a surrender and merger of the term of the existing lease, but the power to grant seems to depend on the power to take a surrender. If there is no power to take a surrender, s. 25 (4) of the Judicature Act, 1873 seems to prevent legal merger, so that the new lease would not be a lease in possession even as regards the legal estate. It seems right that a lease should not be surrendered without the concurrence of the mortgagee.

And see on this subs. *Dundas* v. *Vavasour*, 39 Sol. J. 656. Also n. to s. 7 (1) of the S. L. A.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Incorporeal hereditaments.

As to the condition of re-entry in the case of incorporeal hereditaments, see *Brown* v. *Peto*, 1900, 2 Q. B. 653, and compare *Sitwell* v. *Earl of Londesborough*, 1905, 1 Ch. 460.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

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(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.

Compare S. L. A., s. 8 (1.), and see n. to that s., and to S. L. A., s. 2 (10.) (iii.).

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

The penalty for omitting to deliver the counterpart is that the power of sale becomes exercisable (see s. 20 (iii.)). The validity of the lease is not affected.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

See *Dundas* v. *Vavasour*, 39 Sol. J. 656.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

A contrary intention (if any) will be expressed by the mortgagor and mortgagee in the mortgage deed, whether the mortgagee executes

or not. The mere acceptance by him of the security binds him, as in the ordinary case of an agreement, not to call in the principal money for a fixed term, or for reduction of interest.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

Special provisions allowed.

This subs. enables special provisions to be made as to leasing, and leases made in accordance with such provisions will be in the same position as leases authorized by this s.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

This subs. enables the provisions of this s. to be applied in case of mortgages made before 1881.

Mortgage after the Act under agreement.

Under an agreement made before this Act to execute a mortgage containing a power of sale and all usual clauses, the mortgagee is not entitled to have the operation of this s. excluded: *Re Nugent & Riley*, W. N., 1883, 147; 49 L. T. 132; and compare *Farmer* v. *Pitt*, 1902, 1 Ch. 954.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as

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circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Leases.

Subs. 17, extending the provisions of this s. to agreements, whether in writing or not, for leasing or letting, must be read in connection with the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, and with 8 & 9 Vict. c. 106, s. 3, by the combined operation of which enactments a lease for three years or less may be in writing or parol, but a lease for more than three years must be by deed: see Woodfall, L. & T., 17th ed., 143.

Parol agreement.

The effect of the words "so far as circumstances admit," is that subss. 7 and 8 as to covenant, condition of re-entry, and counterpart do not apply to a parol agreement, and subs. 7 as to covenant does not apply to an agreement in writing, except that there ought to be the nearest approach to a covenant, namely an agreement to pay rent.

This s. removes serious difficulties in granting leases of mortgaged property: see Woodfall, L. & T., 7th ed., 59 *et seq.*

Effect of leases under this s.

Power is given to the person in possession, whether owner or incumbrancer, to grant, or contract to grant (subs. 12), leases of the kind specified in subs. 3, conformable to the other provisions of this s. These leases will be binding on all other persons interested, and will confer a valid legal term, leaving a legal reversion in the mortgagee, assuming the mortgage passed the legal estate to him. The rent and the benefit of the lessee's covenants and the condition of re-entry will become annexed to the actual legal reversion, and will be capable of being recovered, enforced and taken advantage of by the mortgagor while in possession, and then by the mortgagee (see s. 10). The lessee will also, to the extent of covenants or provisions in his favour authorized by law (see *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522), or (see subs. 14) by the mortgage deed, have the same rights against the actual reversioner and persons claiming under him as if he had made or joined in making the lease (see s. 11).

Effect of excluding operation of s. 18.

If the mortgagor's power to lease given by this s. is excluded, then under a lease made by the mortgagor after the mortgage the mortgagee has no reversion, the covenants by the lessee are covenants in gross, and cannot be sued upon by the mortgagee if he forecloses or takes possession, nor by a purchaser from him if he sells, unless the mortgagor joins in conveying and the conveyance is made expressly subject to the lease: see *Cuthbertson* v. *Irving*, 6 H. & N. 135; *Webb* v. *Austin*, 7 Man. & G. 701; *Downe* v. *Thompson*, 9 Q. B. 1037. The only remedy of the mortgagee when he takes possession is to eject the lessee. This in most cases is not desired, and is an inadequate remedy, especially in the case of house property, where an essential part of the value of the reversion consists in an available remedy against the tenant on the covenants to paint, repair, deliver up in repair, &c. In the case of agricultural land also, the covenants may be of importance if only to give the right to an injunction. Also if the operation of the Act be excluded, acceptance of rent by the mortgagee, or by a

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purchaser from him, will constitute the lessee simply tenant from year to year at Common Law, without reference to the terms of the lease, unless a special agreement be previously made (*Corbett* v. *Plowden*, 25 Ch. D. 678; *Keith* v. *R. Gancia*, 1904, 1 Ch. 774, 783), and in the case of agricultural land, will bring into operation the Agricultural Holdings Act, 1883, which renders necessary a year's notice expiring with a year of tenancy. On the other hand, if the lease be made under this s. the mortgagee on taking possession has his remedy for rent on the covenants: *Municipal &c. Bldg. Soc.* v. *Smith*, 22 Q. B. D. 70, and is not affected by any collateral agreement between the mortgagor and the lessee.

If any restriction is to be placed on the power of the mortgagor to lease under this s., it should at most extend to prevent him from granting leases either without certain desired restrictions or without the consent in writing of the mortgagee. The mortgagor must generally, to make his property available, grant leases of some kind, and it is not advisable to compel him to lease as equitable owner only.

Agricultural Holdings Acts.

A sum due for compensation under the Agricultural Holdings Acts, 1883 and 1900, in respect of a lease granted by a mortgagor under this s. would not, it is conceived, be recoverable personally against the mortgagee, but would be only a charge on the holding as against him (s. 31 of the Act of 1883), he being a landlord entitled to receive rents and profits in a "character otherwise than for his own benefit." As to the rights of a tenant of agricultural land, allotments or cottage gardens against a mortgagee not bound by the tenancy, see the Tenants' Compensation Act, 1890, s. 2.

Tenants' Compensation Act, 1890.

Sale; Insurance; Receiver; Timber.

Sale; Insurance; Receiver; Timber.

Sale should be expressed to be under this Act.

A conveyance by a mortgagee selling under the following power should, as is customary in the case of powers given by deed, expressly refer to the power. This, however, is only necessary for the purpose of obtaining the benefit of s. 21 (2), which (following Lord Cranworth's Act, s. 13) only exempts a purchaser from the consequences of an irregularity when the sale is in professed exercise of the power of sale conferred by this Act.

Mortgage should be by deed.

This s. only applies to mortgages by *deed*: subs. 1. It does not affect the power of sale which is implied in the case of a mortgage of shares not made by deed, or a pledge: *Deverges* v. *Sandeman*, 1902, 1 Ch. 579.

Several mortgagees for separate sums.

Where several mortgagees claim under one mortgage, though in distinct sums, it is conceived that all must join in the exercise of the powers conferred on a mortgagee by this Act: see s. 2 (vi.), where "mortgage money" means "money (*i.e.* the whole money) secured by a mortgage," and "mortgagee" (which includes the plural) must necessarily have a corresponding meaning; and see *Blaker* v. *Herts &c. Co.*, 41 Ch. D. 399; but in mortgages of that kind, and in all other

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special cases, express provision should be made as to who is to exercise the powers (see, for this purpose, subss. 2 and 3 of s. 19).

For the application of ss. 19–24 to Registered Charges under the L. T. A.'s, see L. T. A. 1897, s. 9 (2); and to the recovery of the consideration for the redemption of a rentcharge under the Copyhold Acts, see Cop. A., 1887, s. 18; Cop. A., 1894, s. 30 (4).

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

As to the exercise of the power of sale conferred by this s., the conveyance and the application of the sale money, see ss. 20, 21, and as to the power of a mortgagee to give receipts for the sale or other money or securities comprised in the mortgage, see s. 22.

Exercise of power after decree for foreclosure or redemption.

An order nisi for foreclosure, or a judgment in a redemption action does not extinguish the power of sale, but the mortgagee cannot exercise it without the leave of the Court: *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857; but a purchaser for value without notice would get a good title: S. C. 864. The mere commencement of an action for redemption will not prevent an exercise of the power: *Adams* v. *Scott*, 7 W. R. 213. An exercise of the power after foreclosure absolute opens the foreclosure: *Watson* v. *Marston*, 4 D. M. & G. 230. As to the rights and duties of mortgagees in exercising the power of sale, see *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180; *Nutt* v. *Easton*, 1899, 1 Ch. 873.

Mortgaged estate sold with other property.

As to the duty of mortgagees where the mortgaged estate is sold with other property, see the analogous case of the sale of trust property, note to T. A., s. 13.

Bills of Sale Act, 1882.

The statutory form in the Bills of Sale Act, 1882, does not incorporate the power of sale given by this Act: *Calvert* v. *Thomas*, 19 Q.

B. D. 204; nor does the power of sale apply in the case of several debentures given by a joint stock company, see *Blaker* v. *Herts &c. Co.*, 41 Ch. D. 399; and as to a mortgage to a building society in the ordinary form, see *Re Thompson & Holt*, 44 Ch. D. 492; *Re Rummey & Smith*, 1897, 2 Ch. 351.

Debentures and building society mortgages.

The words in subs. (i.) "or any part thereof" do not authorize a sale of trade machinery separately from the land: *Re Yates*, 38 Ch. D. 112. It would seem to follow that mines could not be sold separately from surface (*Buckley* v. *Howell*, 29 Beav. 546), except under T. A., s. 44, as amended by T. A., 1894, s. 3; nor a new easement expressly granted: *Dayrell* v. *Hoare*, 12 A. & E. 356; but, on a sale of part, the mortgagee can convey the part sold with all the legal incidents accompanying the grant, *e.g.* an implied right to light over the part unsold: *Born* v. *Turner*, 1900, 2 Ch. 211.

Trade fixtures, mines, easements.

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

When mortgagee may insure.

Under this subs. the mortgagee will be justified in insuring, unless the mortgagor shows by delivering receipt for premium, or otherwise, that a proper insurance is maintained.

As to the amount and application of the insurance money and the cases in which the mortgagee is not by this Act authorized to insure, see s. 23.

As to the law before the Act, see *Dobson* v. *Land*, 8 Ha. 216, and 23 & 24 Vict. c. 145, s. 11 (2).

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

Receivership of book debts.

As to the appointment, powers, &c., of a receiver, see s. 24.

A receiver cannot, under this subs., be appointed of book debts comprised in a mortgage of a business: *Rutter* v. *Everett*, 1895, 2 Ch. 872, 875, 877; but see subs. (2) below.

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(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

On this subs. see *Re Yates*, 38 Ch. D. 112, at pp. 117, 129.

Proceeds of timber.

It is conceived that proceeds of the sale of timber will be rents and profits, and need not be treated as at once applied (like proceeds of sale of the inheritance, see *Thompson* v. *Hudson*, 10 Eq. 497) in discharge of interest and costs, and then of principal, on taking the account against the mortgagee. As to the mode of taking such account, see *Union B. of L.* v. *Ingram*, 16 Ch. D. 53.

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

See on this subs., *Richards* v. *Overseers of Kidderminster*, 1896, 2 Ch. 212, 219.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

For a case where a special power of sale was held not to exclude the common statutory power, see *Life Interest &c. Corporation* v. *Hand-in-Hand &c. Society*, 1898, 2 Ch. 230, 239.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

Powers more extensive than in Lord Cranworth's Act.

This s. replaces Part II. of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which is repealed (see second schedule to this Act, Part III.), and gives the more complete and extensive powers usually inserted in mortgage deeds. Lord Cranworth's Act only applied to hereditaments. This s. applies to "property" generally, which word includes all real and personal estate, choses in action, and every right or interest which is capable of being mortgaged: see s. 2 (1).

The mortgage deed may extend or restrict the powers given by this Act, and the extended or restricted powers have effect under subs. 2, as if conferred by this Act.

Regulation of exercise of power of sale.

20.—A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

Notice.

As to giving notice, see s. 67.

Waiver.

The right to receive notice may be waived: *Re Thompson & Holt*, 44 Ch. D. 492.

How and to whom to be given.

Where a first mortgage contained a power of sale with a proviso that the power should not be exercised without giving notice to the mortgagor or his *assigns*, the mortgagee having received notice of a second mortgage was held liable in damages to the second mortgagee for not giving him notice before selling: *Hoole* v. *Smith*, 17 Ch. D. 434, and notice to the mortgagor alone was held insufficient, but it was not decided whether notice to the second mortgagee alone would have been sufficient. It is conceived that the mortgagor is not entitled to burden his mortgagee with more than one notice, at least where it is to be given to the mortgagor *or* his assigns. As "mortgagor" includes "any person entitled to redeem according to his estate, interest, or right in the mortgaged property," the expression "one of several mortgagors" means, it is conceived, "one of the several persons entitled, &c., according to his estate," &c., and that it is sufficient if notice of sale be given to the first subsequent incumbrancer who has given notice of his security to the mortgagee who sells.

Mode of excluding this s.

Where an immediate power of sale is desired without notice and without the other restrictions in this s., the proper course will be to agree that the mortgagee shall have the power of sale conferred by this Act, but without the restrictions on the exercise thereof imposed by this s.

Computation of broken month.

"Month" means calendar month: see note at end of s. 2. Where the months are broken the computation of a calendar month runs from the end of a given day in one month to the end of the day with the corresponding number in the ensuing month: *Freeman* v. *Read*, 11 W. R. 802. The first day is excluded: *Young* v. *Higgon*, 6 M. & W. 49; *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204. And see *South Staffs. Tramways Co.* v. *Sickness &c. Assurance Association*, 1891, 1 Q. B. 402.

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

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Interest where no covenant.

Where there is no covenant for payment of interest, after the principal becomes due, there would still, it would seem, be interest accruing, at the old rate, "under the mortgage" as "redemption money": see *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts*, 14 Ch. D. 49 (per Cotton, L.J., at p. 52); *Gordillo* v. *Weguelin*, 5 Ch. D. 287, at pp. 297, 301-2; *Re Frisby*, 43 Ch. D. 106 (see remarks of Fry, L.J., at p. 114). Such interest accrues due from day to day, and "some interest" would, it is conceived, be "in arrear and unpaid" under this subs. at any time when no interest had been paid for more than two months.

Where there was a covenant to pay by instalments, which included interest, and an instalment was in arrear for two months, it was held that interest was in arrear for two months within this s.: *Walsh* v. *Derrick*, 19 T. L. R. 209.

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Under this subs. the power of sale arises on breach of a provision which the mortgagor ought to observe, as, for instance, in a mortgage of a life interest and policy of assurance, on a breach of the covenant as to keeping the policy on foot, or such a statutory provision as in s. 18 (11) above.

Conveyance, receipt, &c., on sale.

21.—(1.)—A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

Mode of exercising power of sale.

Under this s. the mortgagee will proceed exactly as under the ordinary power of sale in a deed. He will convey the freeholds and also any customary freeholds passing by deed and admittance, and also his equity in copyholds by deed. As to copyholds passing by surrender and admittance, if he has a surrender, or if the mortgage was

made by a tenant for life, or a person having the powers of a tenant for life, under S. L. A., 1882, s. 20, he will be admitted and surrender to the purchaser. If he has no surrender, and the mortgage was not made under that Act, the customary legal estate must be obtained by vesting order or otherwise as before the Act.

Mere surrender gives no power to sell copyholds.

A mere surrender of copyholds by way of mortgage, if not under seal, confers no power to sell, but it is conceived that a deed containing a covenant to surrender would confer the power; a covenant to convey freeholds would confer the power, and a covenant to surrender copyholds is a similar covenant to convey. In order clearly to give the power the deed should contain an express charge (which is included in the expression "mortgage," see s. 2 (vi.)), and also a declaration that the mortgagor holds the copyholds in trust for the mortgagee, so as to enable a vesting order to be obtained if required.

Declaration of trust by mortgagor as to copyholds.

And as to leaseholds.

A similar declaration of trust of the mortgagor's term in leaseholds should be contained in a mortgage by demise, and a power for the mortgagee to appoint a new trustee: *London &c. Banking Co.* v. *Goddard*, 1897, 1 Ch. 642.

Power to convey under Lord Cranworth's Act.

Under s. 15 of Lord Cranworth's Act (23 & 24 Vict. c. 145) it has been held in *Hiatt* v. *Hillman*, 19 W. R. 694, that a mortgagee by sub-demise of leaseholds could assign the whole of the original term, and in *Re Solomon & Meagher*, 40 Ch. D. 508, that an equitable mortgagee, selling after 1881 under that Act, could convey the legal estate. This s. confers no such power: *Re Hodson & Howe*, 35 Ch. D. 668, but it can be conferred by means of an irrevocable power of attorney under C. A., 1882, s. 8, which remains in force notwithstanding the death of the principal, but, it is conceived, ceases on the death of the attorney.

Power under this Act.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

A transfer of land by the proprietor of a registered charge with power of sale brings in this subs.: L. T. A., 1897, s. 9 (1).

As to effect of the subs. in favour of purchaser, see *Life Interest &c. Corporation* v. *Hand-in-Hand &c. Society*, 1898, 2 Ch. 230. A vendor cannot, it seems, rely on it against the purchaser, when making out title and before conveyance: see S. C., and compare *Re Edwards to Green*, 58 L. T. 789. Nor will it protect a purchaser buying with notice of impropriety or irregularity in the exercise of the

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power: *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; *Selwyn* v. *Garfit*, 38 Ch. D. 273; *Re Thompson & Holt*, 44 Ch. D. 492; *Bailey* v. *Barnes*, 1894, 1 Ch. 25; *Re Tritton*, W. N., 1891, 194.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

As to paying prior charges.

Under this subs. the mortgagee is authorized not merely to discharge prior incumbrances, but to pay in the sum required under s. 5 to be paid into Court to answer them. He can then sell free from incumbrances. The last words of this subs. include a subsequent incumbrancer (s. 22), to whom therefore a mortgagee may pay any surplus.

Surplus to subsequent incumbrancer.

As to payment of surplus.

The mortgagee must, however, take care that he pays the residue to the right person: see *W. London Commercial Bk.* v. *Reliance Bg. Soc.*, 27 Ch. D. 185; 29 *ib.* 954. This is a liability which as trustee of the residue he cannot avoid, but in a doubtful case he can pay the money into Court, or invest it for the benefit of the persons entitled: *Charles* v. *Jones*, 35 Ch. D. 544, 550; otherwise, he must pay interest thereon at 4 p. c. (see that case and *Eley* v. *Read*, 76 L. T. 39).

And as to claims to surplus of sale money being Statute barred or not, see *Banner* v. *Berridge*, 18 Ch. D. 254, pp. 260–70; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390; *Thorne* v. *Heard*, 1894, 1 Ch. 599; 1895, A. C. 495; and as to constructive notice of second mortgage, S. C., p. 501.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

Effect of sub-mortgage.

See *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 D. M. & G. 594. And *qu.* if, after a sub-mortgage, the sub-mortgagor can, even with his mortgagee's consent, himself exercise the power.

This subs. does not apply to a person merely entitled to give a discharge as agent; *Re Dowson & Jenkins*, 1904, 2 Ch. 219.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

Mortgagee is not a trustee for sale.

A mortgagee, though in selling he has his duties towards his mortgagor, is not a trustee for sale: see *Warner* v. *Jacob*, 20 Ch. D. 220; *Tomlin* v. *Luce*, 41 Ch. D. 573, 43 *ib.* 191; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 410-11; *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762, 778; 1897, A. C. 180; *Nutt* v. *Easton*, 1899, 1 Ch. 873.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Production of deeds.

Recovery of deeds.

On a sale by a second or subsequent mortgagee, being a person entitled to redeem (see definition of mortgagor, s. 2 (vi.), he can, as against a prior mortgagee, under deed subsequent to 1881, obtain production of the title deeds so as to show the title; and having made the proper payments under s. 5 to answer all prior incumbrancers, he is entitled under this subs. to recover the title deeds from the first mortgagee, who would then be a bare trustee of the legal estate.

Mortgagee's receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

It is conceived that this s. applies only to a mortgagee whose mortgage is made by deed after 1881. The supposed mortgagee is one

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who has a power of sale conferred by this Act, which a mortgagee before 1882 has not; see s. 19 (4).

The receipt of the mortgagee is a complete protection to a *bonâ fide* purchaser without notice, even though the security should prove to have been satisfied: *Dicker* v. *Angerstein*, 3 Ch. D. 600.

Mortgagee's receipt valid though security satisfied.

But the person asked by the mortgagee to pay or transfer is not bound to do so without inquiry, if he chooses, as to the state of the account: *Re Bell*, 1896, 1 Ch. 1; *Hockey* v. *Western*, 1898, 1 Ch. 350.

Notice of trusts.

A purchaser who has notice that the mortgage money is trust money is entitled to be shown that the mortgagees are the duly appointed trustees: *Re Blaiberg & Abrahams*, 1899, 2 Ch. 340.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Mortgagee's receipt for surplus sale money and securities.

This s. enables a mortgagee to give a discharge, not only for money arising by sale, but also for money or securities assigned by the mortgage or arising thereunder; for instance, to give a receipt for the surplus on a sale by a prior mortgagee, or in case of a mortgage of a policy or of a reversionary interest in stock, to give a receipt for the policy money or for the stock, and to apply the money in discharge of the debt and costs, and in case of stock, to sell the stock for that purpose.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no assurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is, by this Act, authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

When insurance money to be expended on reinstating.

Under 14 Geo. 3, c. 78, s. 83, insurance money on houses and buildings must at the request of any person interested, or may, in cases of suspicion, be applied in reinstating them: see *Ex p. Gorely*, 4 D. J. & S. 477 (doubted, however, in *Westminster Fire Office* v. *Glasgow Provident Society*, 13 App. Ca. 699); *Rayner* v. *Preston*, 18 Ch. D. 1 (pp. 7, 15); *Castellain* v. *Preston*, 11 Q. B. D. 380.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

Receiver as agent.

See as to the authority of a receiver as agent, *Re Hale*, 1899, 2 Ch. 107; *Semble* a receiver could not under this s. alone pay an unsecured

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debt due by the mortgagor to the mortgagee. See generally as to the position of a receiver under this Act, *White* v. *Metcalf*, 1903, 2 Ch. 567; and compare the dicta in *Jefferys* v. *Dickson*, 1 Ch. 183, at p. 190; *Law* v. *Glenn*, 2 Ch. 634, at p. 641. See also *Gaskell* v. *Gosling*, 1896, 1 Q. B. 669, at p. 691 *et seq.* As to a receiver's personal liability to creditors and others, see and compare *Owen* v. *Cronk*, 1895, 1 Q. B. 265, and *Burt* v. *Bull*, *ib.* 276. A receiver appointed under this s. ceases to be the agent of the mortgagor if he is subsequently appointed receiver by the Court in an action by the mortgagee to enforce his security: *Hand* v. *Blow*, 1901, 2 Ch. 721, 732; or, if the mortgagor is a company, on a winding-up order being made: *Gosling* v. *Gaskell*, 1897, A. C. 575.

Position of receiver.

Personal liability.

Determination of agency.

Change of occupancy.

As to the entry into possession of a receiver creating a change of occupancy within s. 16 of the Poor Rate Assessment and Collection Act, 1869, see *Richards* v. *Kidderminster Overseers*, 1896, 2 Ch. 212; *Re Marriage, Neave & Co.*, *ib.* 663.

Book debts.

The appointment of a receiver is not sufficient to take book debts out of the order and disposition of a bankrupt, unless followed by notice to the debtors within a reasonable time: *Rutter* v. *Everett*, 1895, 2 Ch. 872.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

"The income": see note on s. 19 (1) (iii.).

Under this subs. the receiver acts subject to the rights of any prior mortgagee and to the powers of his receiver (see n. to subs. 8).

"Distress."

Where a receiver under this Act has been appointed, the mortgagor cannot distrain without the receiver's authority, even if the receiver neglects or refuses to do so: *Bayly* v. *Went*, 51 L. T. 764; *Woolston* v. *Ross*, 1900, 1 Ch. 788.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in

satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Position of a receiver.

The power to appoint a receiver is by s. 19 given to the mortgagee to the like extent as if in terms conferred by the mortgage deed. The

receiver of a second or subsequent mortgagee will therefore (see subs. 3 of this s.) be liable to be superseded by the receiver of a prior mortgagee when appointed, but the receiver for the time being, whether under a first or any subsequent mortgage, will, it is conceived, have under subss. 3 and 4 power to recover and give a legal discharge for rent. To prove that the person appointing the receiver is actually a mortgagee, the mortgage deed must be produced. Where it is desired to avoid this, a counterpart of the mortgage may be taken. As mortgage deeds will in future be short, the cost of a counterpart will be much less than that of the old receivership deed.

Power to appoint, how proved.

Repairs by receiver.

Any necessary or proper repairs which a mortgagee could not himself make, unless expressly authorized, without incurring the liability of a mortgagee in possession, may be made by the receiver, if directed in writing by the mortgagee under subs. 8 (iii.); and see *White* v. *Metcalf*, 1903, 2 Ch. 567.

Appointment by Court.

When an action is pending the receiver should be appointed by the Court, and not under this Act: *Tillett* v. *Nixon*, 25 Ch. D. 238; but in the winding-up of a company, the Court will give leave to take possession to a receiver appointed by debenture-holders after the date of the winding-up order: *Re Henry Pound, Son, & Hutchins*, 42 Ch. D. 402.

"Interest accruing due."

Where there is no covenant for payment of interest after the principal is due, as to what is "the interest accruing due," see n. to s. 20 (ii.), *suprà*.

The interest which, under subs. 8 (iv.), the receiver is to pay, is not only that accruing after his appointment, but any arrears: *National Bank* v. *Kenney*, 1898, 1 Ir. R. 197.

Mortgage of a business.

In a mortgage of a business the receiver should be given additional powers to manage and carry on the business, and pay and receive debts due by or to the mortgagor in respect thereof; see *Re Hale*, 1899, 2 Ch. 107; *Rutter* v. *Everett*, 1895, 2 Ch. 872.

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c.

Action respecting Mortgage.

25.—(1.)—Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person,

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and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland.

As to this s., see observations on s. 5.

The result of decisions (see Morgan's Chancery Acts, 196, 197, 5th ed.) was to give a very limited operation to s. 48 of 15 & 16 Vict. c. 86 now repealed (see second schedule, Part II.), and replaced by this s.

15 & 16 Vict c. 86, s. 48.

Orders for sale under this s.

An order for sale may be made under this s. in a foreclosure or redemption action at any time before the action is concluded by a foreclosure absolute: *Union B. of L.* v. *Ingram*, 20 Ch. D. 463 (mortgagee's request: security insufficient); on an interlocutory application before trial of the action: *Woolley* v. *Colman*, 21 *ib.* 169 (mortgagor's request); or even on the motion for foreclosure absolute where a summons for further time has been previously taken out: *Weston* v. *Davidson*, W. N. 1882, 28 (mortgagor's request); and it can be made at request of, and the conduct given to, the mortgagor, though the mortgagee's statutory power of sale has arisen: *Brewer* v. *Square*, 1892, 2 Ch. 111.

An order for sale still usually directs the sale to be made, as before this Act (see Seton, 6th ed., 342, 1391, 1467, 1855), subject to the incumbrances of such of the incumbrancers (not being parties) as

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do not consent. But the sum to meet their charges can be paid into Court under s. 5. Any whose charges cannot be so provided for must be made parties.

Action respecting Mortgage.

The owner of, or any incumbrancer on, an incumbered estate can under this s. bring an action for sale and application of the proceeds (see note to s. 5), but before commencing an action for redemption or sale he should be certain that he can provide the requisite deposit or security for costs, otherwise he may find himself foreclosed.

Course where sale asked by mortgagee or mortgagor.

If the mortgagee asks for a sale under this s., the course of proceeding will be much the same as before the Act in a similar case. If the mortgagor asks for a sale instead of being foreclosed as defendant, or bound to redeem as plaintiff, the course of the proceeding is new. In *Woolley* v. *Colman*, 21 Ch. D. 169, the owner of the equity of redemption was plaintiff, the property being subject to several mortgages. A sale was directed at a reserve price sufficient to pay the two first mortgagees, who opposed a sale, and with the assent of the subsequent mortgagees the conduct of the sale was given to the mortgagor, who was ordered to give security for the costs of it. Where the mortgagor was defendant, and had the conduct of the sale, he was not ordered to give security for costs: *Davies* v. *Wright*, 32 Ch. D. 220; but see *Brewer* v. *Square*, *sup.* In both these cases the sale was allowed to be made out of Court, but the proceeds were directed to be paid into Court. In *Wade* v. *Wilson*, 22 Ch. D. 235, a foreclosure action, in which one of the defendants, the mortgagor, did not appear, and the other, the second mortgagee, made default in pleading, the usual account was directed, and then, after one month from the certificate (see *Green* v. *Biggs*, *inf.*), a sale of a sufficient part of the property to pay the amount found due to the plaintiff. In *Oldham* v. *Stringer*, W. N., 1884, 235; 33 W. R. 251, there was a deposit of deeds without any memorandum, and a sale was ordered instead of foreclosure (mortgagee's request; security insufficient). A sale was ordered also in *Green* v. *Biggs*, W. N., 1885, 128, 52 L. T. 680, and in *Jones* v. *Harris*, W. N., 1887, 10 (in each case at mortgagee's request; three months allowed from certificate), but was refused in *Merchant Banking Co.* v. *London and Hanseatic Bank*, W. N., 1886, 5; 55 L. J. Ch. 479 (mortgagor's request; but sale, at a reserve price to cover the mortgage debt, was likely to be abortive); *Hopkinson* v. *Miers*, 34 Sol. J. 128 (mortgagee's request; but no evidence of security being insufficient; and the property was part of a family estate); and *Smithett* v. *Hesketh*, 44 Ch. D. 161 at p. 163 (mortgagor's request; no evidence of value of the property); also in *Provident Clerks' &c. Association* v. *Lewis*, 62 L. J. Ch. 89.

See also *Brewer* v. *Square*, *sup.*, and the order in Seton, 6th ed., 1915 (Form 7); *Norman* v. *Beaumont*, W. N., 1893, 45; and notes in Seton, 6th ed., 1917–1920.

V.—Statutory Mortgage.

Statutory Mortgage.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following, (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

This clause imposes no statutory personal liability on an assignee of the equity of redemption: see *Re Errington*, 1894, 1 Q. B. 11.

Compare the covenants to be implied in Registered Charges, by L. T. A. ss. 23, 24.

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct.

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms

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STATUTORY MORTGAGE.

(A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

The statutory transfer is available only where the mortgage is also statutory; and the transfer in the statutory form of a mortgage not in the statutory form will not pass the legal estate in the mortgaged property: *Re Beachey*, 1904, 1 Ch. 67.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due, thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to

the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

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"On the next of the days": this is equivalent to a covenant by the transferee not to sue until then: *Bolton* v. *Buckenham*, 1891, 1 Q. B. 278. As to its effect on the personal liability of a surety, see that case; and for its effect on the security given by a surety, see *Bolton* v. *Salmon*, 1891, 2 Ch. 48.

Liability of surety.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage.

A transfer of a mortgage, although further security is given, is only chargeable with duty as a transfer: 33 & 34 Vict. c. 97, s. 109; *Wale* v. *Commrs. of In. Rev.*, 4 Ex. D. 270; Stamp Act, 1891, s. 87 (3).

Stamp duty on transfer.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect to the share or distinct sum secured to him.

Implied covenants, joint and several.

See s. 61, *inf.*

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such

Form of re-conveyance of statutory mortgage in schedule.

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variations and additions, if any, as circumstances may require.

The statutory re-conveyance is available only where the mortgage is statutory also.

TRUST AND MORTGAGE ESTATES ON DEATH.

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

37 & 38 Vict. c. 78.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

38 & 39 Vict. c. 87.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

Compare, with this s., L. T. A. 1897, s. 1.

Copyholds.

Copyhold or customary lands are "tenements or hereditaments" included in this s.: *Re Hughes*, W. N., 1884, 53; *Hall* v. *Bromley*, 35 Ch. D. 642. But s. 45 of the Copyhold Act, 1887, enacted as follows:—

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TRUST AND MORTGAGE ESTATES ON DEATH.

45. The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage.

Copyhold Act, 1887, s. 45.

The Copyhold Act, 1887, is now repealed by the Copyhold Act, 1894, s. 88 of which enacts as follows :—

Copyhold Act, 1894, s. 88.

88. Section thirty of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage.

Unadmitted mortgagee.

Where the mortgagee (as mostly happens) is not admitted and dies, the land is not at his death vested in him as tenant on the Court Rolls, and the right to admittance seems still to vest in his personal representatives under s. 30. An unadmitted heir or devisee of a mortgagee seems to be in the same position.

Extent of the repeal.

No time is specified for the commencement of the operation of s. 45 of the Copyhold Act, 1887. The result is that s. 30 must now be read as having never applied to copyhold or customary land to which a trustee or mortgagee has been admitted. Such land as from the 31st December, 1881, up to the 16th September, 1887 (when the Copyhold Act, 1887, was passed), is divested out of the personal representative and revested in the customary heir or the devisee of trust and mortgage estates unless in the meantime a conveyance has been made by the personal representative: *Re Mills*, 37 Ch. D. 312; 40 *ib.* 14. If this holds good where the personal representative has been admitted then a second fine will now be necessary on admittance o the heir.

Vesting order.

Where the mortgagee has been admitted, and leaves an infant heir, an order may be made vesting the land in the executors : *Re Franklyn's Mortgages*, W. N., 1888, 217.

The repeal effected by s. 45 of the Copyhold Act, 1887, is only directed to s. 30 of this Act, consequently as regards deaths before 1882, when the C. A. took effect, s. 4 of the V. & P. A. still remains in force. The confusion introduced by s. 45 seems considerable. The object was to avoid the larger fine payable on admittance of a stranger in some manors, and might have been attained by giving the personal representative power to convey.

As regards those hereditaments to which alone s. 30 now applies, namely, hereditaments which are not of copyhold or customary tenure, or hereditaments of either of those tenures to which there has been no admittance, that s. operates to constitute the executor or administrator devisee of trust and mortgage estates : *Re Hughes*, W. N., 1884, 53. Whether as to any particular land he is such devisee will be shown in the same manner as if there were an actual devise.

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Personal inheritance.

The word "hereditaments" includes, more clearly than the word "land," a personal inheritance, as an annuity to one "and his heirs": see Co. Lit. 2 a, 20 a; *Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Holdernesse* v. *Carmarthen*, 1 Bro. C. C. 377. Such annuities are sometimes granted by corporations (Manchester, for instance) charged on the borough fund.

Assent by executor.

As to assent by executor under this s., compare *Re Culverhouse*, 1896, 2 Ch. 251, a case on s. 9 (1) of the Finance Act, 1894. It might operate on a specific bequest of a mortgage security.

Heir excluded as trustee.

The constitution of the personal representative to be trustee operates like a devise to exclude the heir from being trustee.

Whether the heir takes until administration.

In the case of *Re Pilling's Trusts*, 26 Ch. D. 432, Pearson, J., asked, "What happens when there is no personal representative? If the legal estate does not vest in the heir, where is it?" In the Colony of Victoria it has been decided that until administration the land descends to the heir-at-law, who can maintain ejectment, but upon grant of administration it vests in the personal representative as from the death: *Larkin* v. *Drysdale*, 1 Vict. L. Rep. (Law) 164; Wood's Laws of the Australasian Colonies, p. 110; and see *John* v. *J.*, 1898, 2 Ch. 573, 576 (a decision on the L. T. A., 1897, s. 1). Clearly the heir cannot convey the fee, as he, if taking, takes only until a representative is constituted, and in the absence of a personal representative a vesting order is necessary: *Re Rackstraw*, 33 W. R. 559; W. N., 1885, 73; *Re Williams*, 36 Ch. D. 231.

Executors may convey before probate.

Executors derive their title from the will, not from the probate, and can under this s. convey before probate a legal freehold as well as a term held in trust by their testator: compare L. T. A., 1897, s. 2 (2); see, however, *Re Parker*, 1894, 1 Ch. 707. Probate is only proof of their title. If all the executors die before probate, subsequent letters of administration are sufficient proof of that title (Wms. Exors., 10th ed., 213).

A single personal representative may convey.

One of several executors or administrators can convey a chattel real, see Wms. Exors., 10th ed., 685; *Simpson* v. *Gutteridge*, 1 Madd. 609, 616; *Jacomb* v. *Harwood*, 2 Ves. Sen. 267–8; but as to freeholds compare now L. T. A., 1897, s. 2 (2), and *Re Pawley*, 1900, 1 Ch. 58.

Devise of trust estates how far proper.

It will now be unnecessary, and also useless, to make any devise of trust or mortgage estates, not being of copyhold or customary tenure. Their devolution is assimilated in all respects to the devolution of a term of years, which must pass to the personal representative; and notwithstanding any devise, the personal representative is the person to convey, and is in all cases the "heir" and "assign" for the purpose of exercising all trusts and powers.

Title to freehold trust estate same as leasehold.

On the death of a sole or last surviving personal representative a new representative must be constituted as in case of personalty. If the executor of a trustee or mortgagee dies and there is no executor to his estate, letters of administration must be taken out to the trustee or mortgagee. The title to a freehold trust or mortgage estate (see *Re Hughes*, W. N., 1884, 53) will in fact be made exactly as if it had been a term of years held in trust or mortgage. As to a grant of

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TRUST AND MORTGAGE ESTATES ON DEATH.

administration limited to a trust estate, see *In b. Butler*, 1898, P. 9; or to a trust fund, see, *In b. Ratcliffe*, 1899, P. 110; it makes no difference whether the estate is real or personal: L. T. A., 1897, s. 2.

It is conceived that an executor who proves cannot disclaim trust estates which devolve upon him by operation of law whether under this s. or otherwise (see Lewin on Trusts, 11th ed., 214). But he can decline to act as trustee, and insist on new trustees being appointed; *ib.*, 816, and see *Re Ridley*, 73 L. J. Ch. 696.

Disclaimer.

Though a freehold trust or mortgage estate now passes to the personal representative, it must still be conveyed to the trustees or mortgagees "and their heirs" or "in fee simple" (see s. 51), in order to give them the fee simple.

Trust estate must still be limited to "heirs," &c.

The powers of trustees (and see, as to mortgagees, *Re Rumney & Smith*, 1897, 2 Ch. 351; *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 D. M. & G. 594) devolve only on those who are specified as persons to execute the trust; and s. 38 (now T. A., s. 22) carries the power to the survivor where the trust is created after 1881. Thus a devise to A. and B. on trust to sell, enables A. and B. and also the survivor of them to sell. The decision in *Osborne to Rowlett*, 13 Ch. D. 774, appears to be an authority that the same applies to trusts created before 1882, but as to the actual decision, see *Re Morton & Hallett*, 15 Ch. D. 143. Where heirs are not specified, the heir of the survivor could not, as it seems (see *Re Morton & Hallet*), before 1882 have sold, though the fee devolved on him, consequently the personal representative of the survivor could not now sell: *Re Ingleby & the Norwich Union Co.*, 13 L. R. Ir. 326. If the devise is "to A. and B. and their heirs on trust, or with power (*Re Pixton & Tong*, 46 W. R. 187) to sell," or to A. and B. in fee simple upon trust "that they and their heirs," or "executors or administrators," or "the trustees or trustee for the time being" (*Re Morton & Hallett, sup.*; *Re Cunningham & Frayling*, 1891, 2 Ch. 567) "shall sell," then under s. 30 the personal representative of the survivor can sell. The effect of s. 30 is that there cannot now (except as to copyhold and customary hereditaments) be any "assign" of a trust estate by means of a devise. The only "assign" is a trustee duly appointed, and s. 31 (5) (now T. A., s. 10 (3)) gives him all the powers of an original trustee, so that (except as before mentioned) it is unnecessary now to specify assigns in order to enable them to execute the trust.

Devolution of powers of trustees.

Persons taking by devise or bequest are "assigns" in law: "testamentary assigns" see *Whitfield* v. *How*, 2 Show. 57; *Titley* v. *Wolstenholme*, 7 Beav. 425, 436; *Osborne to Rowlett, sup.*, pp. 786, 795; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 186.

Devisees are "assigns."

As to when a vendor is a trustee for the purchaser, see note to s. 4, *sup.*

When vendor trustee for purchaser.

This s. renders obsolete, as regards persons dying after 1881 (except as to copyhold and customary land to which there has been an admittance), all the decisions as to what words pass trust and mortgage estates, and as to whether the trusteeship passes to the devisees of trust estates, discussed in 1 Jarm. Wills, 5th ed., 647, *et seq.*

Cases affected.

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It seems that a testator cannot, by appointing special executors of his trust and mortgage estates, make them his "personal representatives" for the purposes of this s.: see *Re Parker*, 1894, 1 Ch. 707, 721-2. At any rate they, before probate, will not be so, as against his general executors, who have proved: see S. C., p. 722.

Special executors.

Every will should now contain a devise to the executors of all copyhold or customary land held on trust or by way of mortgage.

Devise of copyholds.

As to the s. of the L. T. A. repealed by this s., see n. to V. & P. A., s. 5.

TRUSTEES AND EXECUTORS.

VII.—TRUSTEES AND EXECUTORS.

The following ss., 31-38 (both inclusive), are repealed, and in substance re-enacted, by the T. A.; but it may be useful to print them here for purposes of reference.

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) *Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.*

(2.) *On an appointment of a new trustee, the number of trustees may be increased.*

(3.) *On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.*

(4.) *On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.*

(5.) *Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

(6.) *The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.*

(7.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

(8.) *This section applies to trusts created either before or after the commencement of this Act.*

See now T. A., s. 10, which extends the powers of this s. to the case of a trustee desiring to be discharged from "all or any of the trusts or powers reposed in or conferred on him," and embodies C. A., 1882, s. 5; C. A., 1892, s. 6.

And as to the effect of substituting, in T. A., s. 10, for the words in subs. 1 of this s., "the person or persons nominated for this purpose," the words "the person or persons nominated for the purpose of appointing new trustees," see *Re Wheeler & De Rochow*, 1896, 1 Ch. 315.

Retirement of trustee.

32.—(1.) *Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged*

therefrom under this Act, without any new trustee being appointed in his place.

(2.) *Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.*

(3.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

(4.) *This section applies to trusts created either before or after the commencement of this Act.*

See now T. A., s. 11.

Powers of new trustee appointed by court.

33.—(1.) *Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

(2.) *This section applies to appointments made either before or after the commencement of this Act.*

See now T. A., s. 37.

Vesting of trust property in new or continuing trustees.

34.—(1.) *Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purpose of the trust, that estate, interest, or right.*

(2.) *Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing*

trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) *This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.*

(4.) *For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.*

(5.) *This section applies only to deeds executed after the commencement of this Act.*

See now T. A., s. 12.

Power for trustees for sale to sell by auction, &c.

35.—(1.) *Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.*

(2.) *This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.*

(3.) *This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.*

See now T. A., s. 13.

SS. 36, 37.

TRUSTEES AND EXECUTORS.

Trustees' receipts.

36.—(1.) *The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.*

(2.) *This section applies to trusts created either before or after the commencement of this Act.*

See now T. A., s. 20.

Power for executors and trustees to compound, &c.

37.—(1.) *An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.*

(2.) *An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.*

(3.) *As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.*

(4.) *This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.*

See now T. A., s. 21, which extends the powers of this section to administrators.

SS. 38, 39.

TRUSTEES AND EXECUTORS.

Powers to two or more executors or trustees.

38.—(1.) *Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.*

(2.) *This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.*

See now T. A., s. 22.

VIII.—MARRIED WOMEN.

MARRIED WOMEN.

Power for Court to bind interest of married woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Effect of a separation or protection order.

An order under 20 & 21 Vict. c. 85, s. 21, or s. 25, or 41 & 42 Vict. c. 19, s. 4, does not apply to separate estate existing at the date of the desertion or separation, so as to put an end to restraint on anticipation: see *Waite* v. *Morland*, 38 Ch. D. 135; *Hill* v. *Cooper*, 1893, 2 Q. B. 85. But it does so apply as to separate estate accruing afterwards: see those two cases, and *Cooke* v. *Fuller*, 26 Beav. 99; *Munt* v. *Glynes*, 41 L. J. Ch. 639; *Re Hughes*, 1898, 1 Ch. 529. Though separate estate does not require the protection of an order, the words of s. 25 seem to lead to this result, as to such after-acquired separate estate.

Power of Divorce Court to dispense with restraint on anticipation.

As to the jurisdiction of the Court, acting under its statutory powers of directing, in matrimonial causes, a settlement of the wife's property, to deal with an existing restraint on anticipation, see *Michell* v. *M.*, 1891, P. 208; *Thomson* v. *T.*, 1896, P. 263, 271. It can do so only in the cases covered by s. 5 of 22 & 23 Vict. c. 61.

Cases affected.

Before this Act the Court had no power—except by way of sanctioning a compromise of proceedings, see Seton, 6th ed. 934; *Wilton* v. *Hill*, 25 L. J. Ch. 156; *Wall* v. *Rogers*, 9 Eq. 58—to bind the interest of a married woman who was restrained from anticipation, however beneficial it might be to her to do so: see *Robinson* v. *Wheelwright*, 21 Beav. 214, 6 D. M. & G. 535; *Tussaud* v. *T.*, 9 Ch. D. 375, *per* James, L.J.; *Smith* v. *Lucas*, 18 Ch. D. 531.

Nor could she herself bind it by way of admission or estoppel: *Lady Bateman* v. *Faber*, 1897, 2 Ch. 223; 1898, 1 Ch. 144.

S. 39, 40.

MARRIED WOMEN.

Applications under this s.

Applications under this s. must be made by summons in Chambers, s. 69 (3), and not by petition: *Re Lillwall*, 30 W. R. 243, W. N., 1882, 6; *Latham* v. *L.*, W. N., 1889, 171; but see *Re Blundell*, 1901, 2 Ch. 221.

As to the policy of this s., see *Re Pollard*, 1896, 1 Ch. 901; 2 Ch. 552; *Thomson* v. *T.*, 1896, P. 263.

And as to wife's right to indemnity against husband, where the restraint is removed for payment of his debts, see *Paget* v. *P.*, 1898, 1 Ch. 47, 470.

In *Re Sawyer*, 1896, 1 Ir. R. 40, the restraint was removed for the purpose of setting up a child in business, and so relieving the parents of the expense of maintaining him.

See on the intention of this s., *Tamplin* v. *Miller*, W. N., 1882, 44; *Re Warren*, 52 L. J. Ch. 928, W. N., 1883, 125; and see orders made under this s. in *Ex p. Thompson*, W. N., 1884, 28; *Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, *ib.* 215; *Re Flood*, 11 L. R. Ir. 355; *Re Wright*, 15 *ib.* 331; *Re Seagrave*, 17 *ib.* 373; *Hodges* v. *H.*, 20 Ch. D. 749; *Re Little*, 36 *ib.* 701; *Re Currey*, W. N., 1887, 28, 32 Ch. D. 365; *Re C.*, 56 L. J. Ch. 556, and *Re Milner*, 1891, 3 Ch. 547; *Bates* v. *Kesterton*, 1896, 1 Ch. 159, 165: but refused in *Re Warren*, *sup.*; *Re Wheatley*, 27 Ch. D. 606; *Re Wood*, 29 Sol. J. 183; *Re Jordan*, 34 W. R. 270, W. N., 1886, 6; *Re Little*, 40 Ch. D. 418; *Re S.*, W. N., 1893, 127; *Re Pollard*, *sup.*; *Thomson* v. *T.*, *sup.*; *Re Blundell*, *sup.*; *Re Georgi*, 45 Sol. J. 615.

For forms of orders, see Seton, 6th ed., pp. 905-8; and *Re Pollard*, 1896, 1 Ch. 901, at p. 903.

The consent of a married woman under this s. need not in all cases be ascertained by a separate examination: *Hodges* v. *H.*, 20 Ch. D. 749; *Harris* v. *Harford*, W. N., 1888, 190; *Musgrave* v. *Sandeman*, 48 L. T. 215.

How consent taken.

Service on the trustees for the married woman was dispensed with in *Re Little*, 36 Ch. D. 701; and see *Re Tippett & Newbould*, 37 Ch. D. 444, where the order removing the restraint (if any) was made in the absence of the trustee; and as to the practice, *Re Pollard*, *sup.*

Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purposes of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

As to a married woman's power of attorney under this s., see *Stewart* v. *Fletcher*, 38 Ch. D. 627, and see S. C. as to form of order for payment of income of funds in Court, subject to restraint on anticipation, to the attorney of a married woman: see also Seton, 6th ed., 217.

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MARRIED WOMEN.

This s. when originally inserted had more special reference to the clauses struck out in the House of Commons enabling married women to convey by deed simply without acknowledgment. An acknowledged deed is necessarily incapable of being executed by attorney, but under this s. a power of attorney will be effectual as regards all other deeds or acts capable of being executed or done by a married woman.

IX.—INFANTS.

INFANTS.

41.—Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

This s. as originally drafted applied only to a lessee at a rent who was excluded from the S. L. A. drafted at the same time: see s. 58 (v.). As the S. L. A. did not pass in 1881, fee simple land was included here, but a long term was forgotten; ss. 59 and 60 of the S. L. A. make the omission not material.

"At a rent."

Before this Act the Court had no authority to sell the real estate of an infant upon the mere ground that a sale would be beneficial: *Calvert* v. *Godfrey*, 6 Beav. 97; except, perhaps, to sell part, so as to save the rest; see *Re Jackson*, 21 Ch. D. 786; *Re De Teissier's S. E.*, 1893, 1 Ch. 153, 163.

Sale of infant's land in fee simple.

It is conceived that the guardians of an infant may under this s., and ss. 46 and 49 of the S. E. A., 1877, grant leases for twenty-one years of the infant's land without the authority of the Court. As to the power of the Court to authorize leases of infant's land under 11 Geo. 4 & 1 Will. 4, c. 65, see Simpson on Infants, 2nd ed., 368, and *Re Letchford*, 2 Ch. D. 719, where the Court held the leasing power under that Act applied, though the infant was entitled in reversion only.

Leases of infant's land generally.

This s. applies, though the infant is entitled in contingency only: *Re Liddell*, 52 L. J. Ch. 207; *Re Sparrow's S. E.*, 1892, 1 Ch. 412.

All the powers of the S. E. A., 1877, may be executed by the guardians on behalf of the infant (s. 49).

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the

Management of land and receipt and application of income during minority.

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settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

Meaning of settlement.

The word "settlement" includes all settlements by whatever instrument made, whether deed, will, writing, or Act of Parliament; this is clear from subs. 7 of this s., which refers to the instrument by which the settlement is made, and from the definition of "instrument," s. 2 (xiii.).

Infant taking by descent. Trust for payment of rents.

This s. includes the case where an infant takes absolutely: *Re Bradshaw*, 1904, 1 Ir. R. 18; also where an infant takes by descent: *Re Glover*, 1899, 1 Ir. R. 337; *Re Cowley*, 1901, 1 Ch. 38; also where the legal estate is vested in trustees upon trust to pay the rents and profits to an infant. By s. 2 (iii.) possession includes receipt of income, and income includes rents and profits.

S.L.A. trustees.

Trustees for the purposes of the S. L. A.'s are not, by virtue of S. L. A. s. 60, trustees with power of sale under this s.: *Re Helyar*, 1902, 1 Ch. 391.

The trustees appear to take no estate under this power; see *Dean* v. *Dean*, 1891, 3 Ch. 150, 157; *Griggs* v. *Gibson*, 14 W. R. 819.

Mother a guardian.

The mother is now a guardian under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27); and see *Re X.*, 1899, 1 Ch. 526.

Form of application.

As to the form of the application, see *Tuthill* v. *T.*, 1902, 1 Ir. R. 429; and compare *Re Cowley*, *sup.*

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and

tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

As to these terms and restrictions, see *Honywood* v. *H.*, 18 Eq. 306; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

Cost of repairs thrown on capital.

For the Court's powers to direct money to be raised for the cost of necessary repairs of property to which an infant is absolutely entitled, see *Re Jackson*, 21 Ch. D. 786; *Conway* v. *Fenton*, 40 Ch. D. 512; *Re De Teissier's S.E.*, 1893, 1 Ch. 165; *Re Montagu*, 1897, 1 Ch. 685; *ib.* 2 Ch. 8; *Re Hawker*, 41 Sol. J. 333.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

Payment of income to parent or guardian.

The power in this subs. and in s. 43 (i.) to pay income to the parent or guardian for the infant's maintenance, education, or benefit, necessarily implies a power for the parent or guardian to give receipts, and exempts a person paying from seeing to the application of the money, just as a like power to trustees is necessarily implied where they are directed to sell land and divide the proceeds amongst infants: *Sowarsby* v. *Lacy*, 4 Mad. 142; *Lavender* v. *Stanton*, 6 Mad. 46.

Maintenance while father alive.

Where the father is living, the amount to be allowed for maintenance is in the discretion of the trustees: *Wilson* v. *Turner*, 22 Ch. D. 521; *Re Lofthouse*, 29 *ib.* 932. But a trustee who is also one of two guardians cannot discharge himself from his duty as guardian by payment of the income of his co-guardian; strict voucher of items is

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not required, but a proper sum will be allowed; *Re Evans*, 26 Ch. D. 58, 63; and see *Barnes or Ross* v. *Ross*, 1896, A. C. 625 (a Scotch case).

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments: and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived from descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an

undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

How far this s. agrees with the usual form.

This s. goes somewhat beyond what can be done by deed. The trust extends over the minority of a tenant in tail by descent, as well as the minority of a tenant in tail by purchase, which in a deed or will would be a void trust (see 1 Jarman, 274, 4th ed.; 237–8, 5th ed.). To this there is practically no objection, as the same accumulation would take place by operation of law or under the direction of the Court in an administration action. Under subs. 5 the trust for disposal of the proceeds of accumulation is strictly confined within what could be done by deed or will.

Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Does not apply where vesting is after 21.

This s. does not apply to property the vesting of which is or may be postponed beyond the age of twenty-one years: *Re Judkin*, 25 Ch. D. 743. In all such cases where the vesting is so postponed, a clause making this s. applicable is necessary.

Defeasible life interest.

The s. was held to apply in a case where an infant had a vested life interest defeasible on bankruptcy or alienation: *Re Long*, W. N., 1901, 166; but *qu.* as to the correctness of that decision; see *Re Buckley*, 22 Ch. D. 583 (decided on s. 26 of 23 & 24 Vict. c. 145); *Re Scott*, 1902, 1 Ch. 918, 925.

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As to the implied power of the parent or guardian to give receipts for income, and as to the allowance for maintenance where the father is living, see D. to s. 42 (4); and as to controlling the discretion of a trustee in regard to maintenance and education as long as the discretion is honestly exercised, see *Re Lofthouse*, 29 Ch. D. 921; *Re Bryant*, 1894, 1 Ch. 324.

A gift of residue to an infant makes the executor a trustee within this s., when the residue is ascertained: *Re Smith*, 42 Ch. D. 302.

"Benefit."

For extent of the word "benefit," see *Lowther* v. *Bentinck*, 19 Eq. 166; *Re Breeds*, 1 Ch. D. 226, 228.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

Past maintenance.

Under this and the preceding subs. trustees may apply past accumulations in payment of past maintenance; *Re Pitts*, W. N., 1884, 225, 242; and compare *Re Wise*, 1896, 1 Ch. 281, 286.

Infant tenant for life.

Accumulations of income in which an infant had a vested life interest, were paid to her at twenty-one as the person ultimately entitled to the property from which they arose: *Re Wells*, 43 Ch. D. 281; *Re Humphreys*, 1893, 3 Ch. 1; the ground of the decision in the last case being, however, that there was a contrary intention within subs. 3; and for the same reason it is conceived that if an infant with a vested life interest died under twenty-one, the accumulations would be part of the infant's estate; but where the gift of income is contingent on the infant attaining twenty-one, he is not entitled to the accumulations on attaining that age, and they must be added to the capital: *Re Bowlby*, 1904, 2 Ch. 685; overruling *Re Scott*, 1902, 1 Ch. 918.

For investments of trust money authorized by law, see T. A., *inf.*

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

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"Contrary intention."

A direction to accumulate the income of shares given to infants contingently on attaining twenty-one, and to pay the same to them as and when their presumptive shares become payable, is not a contrary intention excluding the operation of subs. 1: *Re Thatcher*, 26 Ch. D. 426; compare *King-Harman* v. *Cayley*, 1899, 1 Ir. R. 39; and see *Re Dickson*, 29 Ch. D. 331, 338–9; *Re Humphreys*, *sup.*

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

Applies to cases only where income goes with capital.

Under s. 26 of Lord Cranworth's Act, the expression "income to which such infant *may be entitled*" was held to mean "*may be or become entitled*," so as to include income accruing on a fund to which an infant was contingently entitled: *Re Cotton*, 1 Ch. D. 232, but where no income was accruing before the contingency the s. did not apply: *Re George*, 5 Ch. D. 837. The same holds good under this s. of this Act: *Re Judkin*, 25 Ch. D. 743; *Re Dickson*, 28 Ch. D. 291, 29 *ib.* 334; *Re Bowlby*, 1904, 2 Ch. 685; but if the legacy is directed to be set apart for the benefit of the legatees and not merely for the convenience of the residuary estate (see *Re Inman*, 1893, 3 Ch. 518; *Re Snaith*, 71 L. T. 318), the income may be applied under this s. (*Johnston* v. *O'Neill*, 3 L. R. Ir. 476; *Re Medlock*, 55 L. J. Ch. 738; W. N., 1886, 111); and that, whether the legacy is specific or only pecuniary: *Re Clements*, 1894, 1 Ch. 665; *Re Woodin*, 1895, 2 Ch. 309 (a bequest of leaseholds), but see *Re Averill*, 1898, 1 Ch. 523, as to a devise of freeholds. Nor does this s. apply where the whole income is subject to a prior express trust for accumulation: *Re Alford*, 32 Ch. D. 383.

In the case of a pecuniary legacy to an infant contingent on his attaining twenty-one, and carrying interest in the meantime, the executors are bound to set it apart, and would but for this s. accumulate the whole income; and compare *Re Hall*, 1903, 2 Ch. 226. The effect of this s. is, that, in the absence of any direction to the contrary, if the infant dies under twenty-one the residuary legatee takes only the accumulations representing the residue of the income not applied under it. On the other hand, if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the s. can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of the s. seems capable of being stated thus: Where the income will go along with the capital if and when the capital vests, then the income is applicable under the s. for the benefit of the infant, otherwise not.

And the Court of Appeal has held in *Re Holford*, 1894, 3 Ch. 30 (overruling *Re Jeffery*, 1891, 1 Ch. 671), that where there is a gift to several, contingently on attaining twenty-one, of a fund which carries intermediate income, the member of the class who first attains

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twenty-one does not then become entitled to the income of the whole fund, until the next share in the corpus of the fund vests; but those under twenty-one can still be maintained, under this s., out of the income of their contingent shares: and this applies whether or not the class is capable of increase: *Re Jeffery*, 1895, 2 Ch. 577. But this rule has no application in the case of a contingent devise of real estate to the members of a class who attain twenty-one, as a future devise of real estate does not carry the intermediate rents: *Re Averill, sup.*

The tacit incorporation of this s. in a gift of residue among the testator's infant children, who also take contingent legacies under the will, does not displace the rule that the legacies carry interest from the testator's death: *Re Moody*, 1895, 1 Ch. 101.

Difference between ss. 42 and 43.

S. 42 authorizes the application of the rents and profits of land as defined by s. 2 (ii.) for the maintenance, education, or benefit of an infant only where the instrument under which the interest of the infant arises comes into operation after 1881, but s. 43 applies to any property as defined by s. 2 (i.), whether the instrument comes into operation after 1881 or not.

RENT-CHARGES AND OTHER ANNUAL SUMS.

X.—RENT-CHARGES AND OTHER ANNUAL SUMS.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the

intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject

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to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

See S. L. A., 1890, s. 9.

Copyhold Acts.

Rent-charges under the Copyhold Acts are recoverable by the remedies given by this s.: Cop. A., 1887, s. 16; Cop. A., 1894, s. 27 (*e*).

Improvement of Land Act, 1899, s. 3.

And so is any instalment accruing due after 1899 of any rent-charge created under the Improvement of Land Act, 1864, or under any special improvement Act: Improvement of Land Act, 1899, s. 3.

How agrees with usual form.

This s. gives the ordinary remedy for enforcing payment of a rent-charge, except that instead of a term, power only is given to limit a term. The remedy by means of a term is rarely wanted, and if wanted the term can be created.

Why a term necessary.

Where by reason of a lease being prior in date to the limitation of a rent-charge, or being granted under a power which has priority to a rent-charge, the lessee's title is paramount to the rent-charge, the remedy by distress is not available, and the lessee is only liable to pay his rent to the reversioner. Hence the necessity for a term.

Remoteness.

"So far as those remedies might have been conferred by the instrument": The better opinion seems to be that the power of entry conferred by subs. 3 would not, if contained in an instrument creating a perpetual rent-charge, be void for remoteness, the reason being that it is part of the estate of the grantee in the rent, and does not create an independent interest in the property charged; see Lewis on Perp., 618, 619; but an express power to limit a term to a trustee as in subs. 4, though it would no more affect the alienability or value of the land than the power of entry, is within the letter, if not the spirit, of the rule against perpetuities.

Instrument under which the annual sum arises.

Where a rent-charge is created under a power (*e.g.* a power of charging jointures), it is conceived that the instrument under which it arises is the instrument exercising the power, not the settlement giving it. The instrument exercising the power is that by which remedies would be conferred (see the last sentence of subs. 1), and any expression of a contrary intention in the settlement (see subs. 5) would be most unlikely. But see *Re Butler*, Ir. R. 3 Eq. 138 (a decision on Malins' Act). The point is of importance if the settlement is dated before 1882.

Other remedies.

Where on the creation of a rent-charge a term is limited to trustees for securing it, the owner of the rent-charge must resort to the term, and is not entitled to an order for sale of the inheritance to raise arrears: *Blackburne* v. *Hope-Edwardes*, 1901, 1 Ch. 419; but it is conceived that this rule would not apply where the term was created by the owner of the rent-charge under this s. The remedies given

by this s. do not prevent recourse to other remedies: *Searle* v. *Cooke*, 43 Ch. D. 519, 533. As to the power of the Court to order the arrears of a rent-charge to be raised by sale or mortgage, see *Re Tucker*, 1893, 2 Ch. 323; *Hambro* v. *H.*, 1894, 2 Ch. 564.

Action of debt against *terre*-tenant.

As to the recovery from the *terre*-tenant (*i.e.* the person entitled to the first estate of freehold in the land charged) of rent-charges and arrears in an action of debt, whether the profits of the land have been received or not, see *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Pertwee* v. *Townsend*, 1896, 2 Q. B. 129; *Re Herbage Rents, Greenwich*, 1896, 2 Ch. 811; and see 41 Sol. J. 107; 44 *ib.* 390.

This s. does not apply so as to give a right of distress, where a sub-lease is granted for a period co-extensive with, or longer than the original term: *Lewis* v. *Baker*, 1905, 1 Ch. 46.

Redemption of quitrents and other perpetual charges.

45.—(1.) Where there is a quitrent, chief-rent, rent-charge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

The Board of Agriculture and Fisheries is now charged with this duty: see the Board of Agriculture and Fisheries Acts, 1889 and 1903.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

Trust for, or power of, sale.

The Board act under this subs. in cases where there is a power of sale in trustees of a settlement, or in the tenant for life under the S. L. Acts. The tenant for life and the trustees are together the persons entitled to the rent, to whom the notice is to be given.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

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(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rent-charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

The rents referred to in this s., except a perpetual rent-charge or annuity, are incidents of tenure, and would not be incumbrances within s. 5.

Procedure under the s.

The Board require an application in writing, but not in any special form, signed by the owner of the land, or some person interested therein; the application should contain a statement of the facts sufficient to show that the application is within the s.

The office fee for the certificate under subs. 1 is 10s. No further fee is charged for the certificate under subs. 3.

The Board do not deal with the expenses of the application.

On whom expense falls.

The entire expense of redeeming the rent necessarily falls on the person redeeming. He has to procure the certificate of the Board as to the amount to be paid, and satisfy the Board by statutory declaration, or other sufficient evidence, that payment or tender of that amount has been duly made. The person entitled to the rent has only to receive the redemption money.

Apportionment.

As to obtaining apportionment of rents mentioned in this s., see the Inclosure Act, 1854 (17 & 18 Vict. c. 97), ss. 10–14.

XI.—POWERS OF ATTORNEY.

POWERS OF ATTORNEY.

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

SS. 46, 47.

POWERS OF ATTORNEY.

This s. had especial reference to clauses which were struck out of the Bill in the House of Commons, but which are now contained in the C. A., 1882, ss. 8 and 9.

The execution after 1881 of an instrument by an attorney in his own name will not be invalid. It is not necessary, though proper, to express that he executes as attorney, or on behalf of his principal.

The provision as to the donee using his own seal would seem to apply where a Corporation has appointed an attorney.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation, was not at the time of the payment or act known to the person making or doing the same.

Payment by attorney under power without notice of death, &c., good.

As to the meaning of bankruptcy, see n. to s. 2 (xv.). Apart from the statute winding-up proceedings are not a revocation of a power of attorney, without notice of them: see *Re Oriental Bank*, 28 Ch. D. 634, 640.

Bankruptcy.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

This s. is supplementary to the T. A., s. 23, which replaces 22 & 23 Vict. c. 35, s. 26, and applies only to trustees, executors, and administrators: see s. 50 of the later Act.

The marginal note is misleading. Subs. 2 is more applicable to payments to than to payments by an attorney; and it is conceived that the s. applies to all dealings by any person without notice that a power of attorney, under which he or any other party to the transaction was acting, had been revoked.

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POWERS OF ATTORNEY.

And as to notice being necessary, apart from statute, in order to terminate an agent's authority—except in case of bankruptcy or death —see *Re Oriental Bank, sup.*

Further provision is made for powers of attorney by ss. 8 and 9 of the C. A., 1882. It is still necessary for a purchaser taking a conveyance under power of attorney not made in accordance with that Act, to ascertain that the principal is alive at the time of execution of the conveyance. But this s. seems to enable the attorney to give a valid discharge for the purchase-money, so that where the contract is binding on the vendor, the purchaser would obtain a good equitable title. The legal estate would remain outstanding, but a conveyance could be obtained from the personal representatives under s. 4 or s. 30 of this Act. Notwithstanding this s., it will be best still to continue the old practice of depositing or retaining the purchase-money until it is ascertained that the vendor survived the date of execution by his attorney, unless the power can be and is made absolutely irrevocable under s. 8 of C. A., 1882, or made irrevocable for a specified period under s. 9 of that Act, and in the latter case the execution by the attorney must be within the specified period.

As to completing purchase under power of attorney under this s.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court *of Judicature.*

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

It is the practice of the Central Office to apply this subs. only to copies presented at the time of depositing the power. Copies afterwards wanted must be bespoken and made in the Central Office: see the Rule under this s., *inf.* Ch. V., and the Annual Practice for 1905, vol. ii. p. 657.

Revocation of powers of attorney.

The Central Office allow a deed of revocation of a power of attorney to be deposited, and will note against the power of attorney the fact of its revocation.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the

contents of the instrument and of the deposit thereof in the Central Office.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office and prescribing, with the concurrence of the *Commissioners of Her Majesty's* Treasury, the fees to be taken therein.

See rule under this s. *inf.* Ch. V.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

The words in italics were repealed by the Statute Law Revision Act, 1898.

There is always a difficulty in securing the production of a general power of attorney for the benefit of those whose rights depend on an exercise of the power, the original document being necessarily retained for subsequent use. Under this s. the original may be deposited, and may be inspected and an office copy may be obtained.

As to need for the production of the power for purposes of title, see *Re Airey*, 1897, 1 Ch. 164.

As to the filing of powers of attorney relating only to registered land, see L. T. R. 1903, r. 110.

XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Use of word grant unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

As to necessity for word "grant."

Since the Act 8 & 9 Vict. c. 106, s. 2, enabled land in possession to be conveyed by grant, it has been the practice to use that word in conveyances of freehold land, though probably not necessary, if the intent to pass the estate is clear: see *Chester* v. *Willan*, 2 Wms. Saund. 96a (1); *Shove* v. *Pincke*, 5 T. R. 124. This s. removes any question as to the necessity of so doing. The word "convey" may be used where convenient as to both freeholds and leaseholds (see ss. 2 (v.), 57, and Forms in Fourth Schedule of this Act). It is not necessary to use the word "grant" except where it implies covenants under Acts of Parliament, as under s. 132 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

SS. 50, 51.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

The first part of this s. is supplementary to 22 & 23 Vict. c. 35, s. 21 (which applies only to personal property other than choses in action), and is only intended to apply to a conveyance in joint tenancy, as in the ordinary case of the appointment of a new trustee. If land conveyed by A. is to be held in common by himself and B., the proper course is either for A. to convey an undivided share to B., or to convey the entirety to B. to the use of himself and B. as tenants in common. The latter form would be adopted only to make covenants run with the land; but *qu.* if covenants implied under s. 7 would run with A.'s moiety: see note on that s., subs. (1), *sup.*

How land to be conveyed to tenants in common.

Assignment of leaseholds, &c., by husband to wife and *vice versa.*

Till the M. W. P. A. an assignment of leaseholds, or choses in possession by a husband to a wife was inoperative, nor, if voluntary, would it take effect as a declaration of trust: *Re Breton's Estate,* 17 Ch. D. 416. Now by the M. W. P. A. a married woman is capable of acquiring and disposing of any real or personal property, as her separate property, in the same manner as if she were a *feme sole,* and therefore is capable of acquiring it from, or conveying it to her husband: see *Ramsay* v. *Margrett,* 1894, 2 Q. B. 18.

Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the word heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

See this s. illustrated in the 4th Schedule, Form IV.

"In fee."

The words "in fee" alone are not sufficient: *Re Ethel & Mitchell,* 1901, 1 Ch. 945.

SS. 51, 52, 53.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

The principal effect of this s. is to shorten the expressions required in a deed to create estates tail and cross remainders. There still remains the distinction between deeds and wills, that in a will many expressions, such as "A. and his assigns for ever," "A. and his issue," &c., will create an estate of inheritance, but in a deed no words are sufficient to pass the legal fee except either the old technical words or the words authorized by this s. As to the absence of words of limitation in settlements of equitable estates, see *Re Tringham's Trusts*, 1904, 2 Ch. 487; *Re Irwin*, 1904, 2 Ch. 752; and cases there cited *Re Oliver*, 1905, 1 Ch. 191. As to conveyances to corporations, see Co. Lit., 9b, 94b. The s. does not apply to them.

Short expression for estate tail, &c.

Words of limitation in settlements of equitable interests.

This s. applies only to deeds, therefore a surrender of copyholds should be made in the same terms according to the custom as before the Act.

Surrender of copyholds to be as heretofore.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

Powers simply collateral.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Married women.

Under this s. a married woman, though married before 1883, can release a power by deed unacknowledged: *Re Chisholm's Settlement*, 1901, 2 Ch. 82.

This s. removes the difficulty which arose from the indestructibility of powers simply collateral, that is, powers given to a person, not taking any estate, to dispose of or charge the estate in favour of some other person (see Sug. Powers, 8th ed., 49). But a power coupled with a duty cannot be released: *Re Eyre*, 49 L. T. N. S. 259, W. N. 1883, 153; *Weller* v. *Ker*, L. R. 1 Sc. App. 11; *Saul* v. *Pattinson*, 55 L. J., Ch. 831.

Power coupled with a duty.

The ordinary power of appointment among children or issue, given to a tenant for life in a settlement, is not such a power coupled with a duty; and the donee of the power, entitled in a reversion on his own life interest to a child's share in default of appointment, can release the power, and, on surrendering his life interest, call for transfer of the share: *Re Radcliffe*, 1892, 1 Ch. 227; *Re Somes*, 1896, 1 Ch. 250; but his trustee in bankruptcy cannot release the power for the benefit of the estate: *Re Rose*, 1904, 2 Ch. 348.

As to disclaimer of powers, see C. A., 1882, s. 6.

Disclaimer of powers.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of

Construction of supplemental deed.

SS. 53, 54, 55.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

See note to s. 3 (3).

Practical use of this s.

The enactment in this s., though not necessary, seemed required to introduce the practice of using, instead of an indorsed deed, a separate deed in a similar form referring to but not reciting the previous deed. Except where recitals are required the reference to the previous deed need only be such as clearly to identify it. For this purpose the date and the parties, with some explanation of the nature of the principal deed in order to make the supplemental deed intelligible, will be sufficient (see 4th Schedule, Form II.). If deeds be made up bookwise in a form now common, the supplemental deed can be attached after execution, and both together will be easily readable. A further charge cannot as a general rule be made by indorsement on the mortgage deed, which the mortgagee will not allow out of his possession, but a supplemental deed of further charge can be sent to the mortgagor for execution, and afterwards annexed by the mortgagee to his mortgage deed, without letting the latter go out of his possession.

Any document may be supplemental.

This s. only speaks of a deed supplemental to another deed, but any document may also be made supplemental to a deed or will or to any other document.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Effect of receipt in body of deed.

This and the preceding s. make the receipt in the body of a deed executed after 1881 sufficient evidence of payment: *Lloyds Bank* v.

Bullock, 1896, 2 Ch. 192; *Bateman* v. *Hunt*, 1904, 2 K. B. 530. Formerly that receipt was in equity little more than a mere form: see *Kennedy* v. *Green*, 3 My. & K. 699, 716; *Greenslade* v. *Dare*, 20 Beav. 284, 292.

Statutory form of transfer.

The same principle (that of estoppel) applies to the statement that the consideration money has been paid contained in a transfer made in a form prescribed by statute, without any express receipt clause: *Rimmer* v. *Webster*, 1902, 2 Ch. 163. A recital of a payment has always been held to bind the parties without a separate receipt.

Recital of a payment.

What is a sufficient receipt.

There must be something more than a general statement that consideration has been given; specific sums or items must be mentioned to give a receipt for consideration its statutory effect under this s.: see *Renner* v. *Tolley*, W. N., 1893, 90 (but *qu.* was any receipt necessary? the money was in the lease stated "to have been expended," and was not paid to the lessor. He could not acknowledge the receipt).

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

This s. meets the dictum of L. J. Turner in *Viney* v. *Chaplin*, 2 De G. & J. 468, 482, making an additional document necessary where the purchase-money was to be paid to the vendor's solicitor, namely, an express authority to pay to him: see also *Ex p. Swinbanks*, 11 Ch. D. 525.

Practice not altered.

It makes no alteration in the mode of procedure on the completion of a purchase, but only gives an additional security to a purchaser. The absence of a written authority to a solicitor to receive consideration money was never relied on in practice as preventing payment. Each person entitled to receive acted as if the execution by him of the deed and indorsed receipt enabled the producer of the deed so executed to receive without further authority. This was supposed to be the law before *Viney* v. *Chaplin*, and is now the law in reality. In practice it is perfectly well known to all parties who is the solicitor

SS. 56, 57, 58.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

acting for each person, and entitled to receive (in fact, on a sale, the vendor's solicitor is usually named in the conditions or contract); the payment will be made to him, and a purchaser knowingly making payment to the wrong person would not be absolved by this s. If any one of several persons entitled to receive chooses not to let the deed out of his possession, when executed by him, his only course is to attend on completion.

Ss. 54 and 56 render unnecessary the indorsed receipt and the separate authority to pay, and prevent the difficulty and delay sometimes caused by the omission to sign an indorsed receipt. The one receipt now required may be either in the body of the deed or indorsed.

Cheques.

As to payment by cheque, see *Papè* v. *Westacott*, 1894, 1 Q. B. 272; *Blumberg* v. *Life Interests &c. Corpn.*, 1897, 1 Ch. 171; 1898, 1 Ch. 29; *Johnston* v. *Boyes*, 1899, 2 Ch. 73.

Trustees.

This s. has now been extended to the case of trustees (see T. A., s. 17 (1), and who were held not to be within it unless they had power to authorize payment to their solicitor: *Re Bellamy & Metropolitan B. of W.*, 24 Ch. D. 387; *Re Flower and the same*, 27 *ib.* 592.

Solicitor must act for person receiving.

The solicitor producing the deed must be acting for the person signing the receipt therein, and must produce the deed and not merely have it in his possession: *Day* v. *Woolwich &c. Society*, 40 Ch. D. 491; approved in *Re Hetling & Merton*, 1893, 3 Ch. 269; but see *King* v. *Smith*, 1900, 2 Ch. 425, 432.

Whether s. applies to release.

Where trustees are dividing trust funds and paying to the beneficiaries their shares, it seems doubtful whether this s. authorizes payment of a share to a solicitor producing a deed of release. The trustees are bound to pay, and the payment can scarcely be taken as the consideration for the release which is consequent on due payment being or having been already made.

Sufficiency of forms in Fourth Schedule.

57.—Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

The forms referred to are not in any way directory. They are merely illustrative of the modes in which the Act may be applied in practice.

Covenants to bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be

deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

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CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Benefit of real covenants.

This s. renders unnecessary the mention of "heirs and assigns," or "executors, administrators, and assigns," of the covenantee for the purpose of making the benefit of a covenant run with the land, but it does not make a covenant so run where it would not so run if the "heirs and assigns," or "executors, administrators, and assigns" were expressed.

Testamentary assigns.

"Assigns" includes persons taking by devise or bequest—"testamentary assigns"—see cases cited in n. to s. 30, *sup.*

Lessees.

A lessee of a covenantee can enforce a restrictive covenant as an assign: *Taite* v. *Gosling*, 11 Ch. D. 273; and the lessee of a covenantor will be bound by one with notice: *John Brothers* v. *Holmes*, 1900, 1 Ch. 188; *Holloway Brothers, Ltd.* v. *Hill*, 1902, 2 Ch. 612. On the other hand, a lessee (covenantor) is not liable in damages or to forfeiture for the acts of his underlessee, he having covenanted against acts of assigns, not mentioning underlessees: *Bryant* v. *Hancock*, 1898, 1 Q. B. 716; 1899, A. C. 442; *Wilson* v. *Twamley*, 1904, 2 K. B. 99; *Porter* v. *Gibbons*, 48 Sol. J. 814.

Liability for breach by underlessee.

In the case of a lease s. 10 annexes to the reversion the *benefit* of all the *lessee's* covenants, and so gives this benefit to "assigns" though not mentioned, and also though the covenant be not entered into with the reversioner, as where the lessor has a mere power; and s. 11 annexes the *obligation* of a *lessor's* covenant to the reversionary estate, and so binds assigns though not mentioned where the lessor has power to bind that estate. In all other cases the obligation of a covenant relating to land is carried no further than before the Act, and to bind the "assigns" they must still be mentioned where mention was necessary before the Act, for instance, in a lease where the covenant concerns a thing not *in esse* at the time of the demise, as to build a wall (*Spencer's Case*, 1 Smith L. C. 11th ed., 55). In cases other than those between landlord and tenant it is doubtful whether the obligation of any covenant not involving a grant runs with the land at law, independently of the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 24, 25 (11); see *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Knight* v. *Simmonds*, 1896, 2 Ch. 294, 297; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, but it does run in equity except as against a purchaser for value *without* notice, and *with* the legal estate (and unaffected by the rule against perpetuities, see *Mackenzie* v. *Childers*, 43 Ch. D. 265), where the intention is clear that the assigns should be bound: see *Tulk* v. *Moxhay*, 2 Ph. 774, where the assigns were mentioned: *Wilson* v. *Hart*, L. R. 1 Ch. Ap. 463, where the assigns were not mentioned; and see *Re Fawcett & Holmes*, 42 Ch. D. 150, where they were

Cases where "assigns" must be mentioned.

Covenants not between landlord and tenant.

Restrictive covenants.

Burden in equity.

SS. 58, 59.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

mentioned in the affirmative part of the covenant, but not in the negative part: and where the covenant is merely restrictive of the user of land, and can be enforced by injunction and imposes no pecuniary obligation (*Haywood* v. *Brunswick Build. Soc.*, 8 Q. B. D. 403, 408; *London & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562; *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Re Nisbet & Potts*, 1905, 1 Ch. 391). The result seems to be that all covenants, where the burden is intended to run with the land, should be made by the covenantor for himself and his assigns.

Benefit in equity.

As to the benefit running with the land, see *Keates* v. *Lyon*, 4 Ch. 218; *Renals* v. *Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866; *Nottingham Patent Brick & Tile Co.* v. *Butler*, 15 Q. B. D. 261; 16 *ib.* 778; *Austerberry* v. *Oldham*, 29 Ch. D. 750, 775–8, 780, 784; *Rogers* v. *Hosegood*, *sup.*; and as to the result where the land comes to be split up among a number of separate assigns, see *Everett* v. *Remington*, 1892, 3 Ch. 148.

Covenants to extend to heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Priority of creditor by specialty.

Though by the Act 32 & 33 Vict. c. 46, specialty debts binding the heirs rank no higher in the administration of assets than other debts against the land, there is still, under 11 Geo. 4 & 1 Will. 4, c. 47, ss. 6 and 8, the power to sue the heir or devisee personally for such debts, and obtain judgment against him to the extent of the assets which have devolved on him: see *Re Hedgely*, 34 Ch. D. 379. Accordingly a creditor having so obtained judgment takes priority of other creditors against the land, and recovers without any necessity for probate or letters of administration, which are only required to support proceedings in an administration action. But where the covenantor dies after 1897, administration must be taken out and the property must be

conveyed to the heir, or the devise assented to, before proceedings can be effectual against the heir or devisee: L. T. A., 1897, ss. 1 and 3. All covenants will now bind the heir or devisee so as to enable an action to be brought against him personally, though the heir is not expressly mentioned. It has always been unnecessary expressly to mention executors or administrators.

SS. 59, 60, 61.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant, implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of ss. 58–60.

This s. must be read in connection with ss. 58 and 59. The result of the three last preceding ss. taken together, is that all covenants are greatly shortened, and the form of a covenant with several persons is reduced to that of a covenant with one person. The same principle applies to any contract under seal, as, for instance, the proviso for redemption or the proviso for reduction of the rate of interest on a mortgage, and to contracts in a marriage settlement.

As to covenants, apart from this enactment, being "measured and moulded according to the interests of the covenan*tees*," see the authorities cited in *White* v. *Tyndall*, 13 App. Ca. 263.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as

S. 61.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain, money, or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Joint account clause.

The express joint account clause had two objects: (1) To rebut the presumption in equity that the money was advanced in equal shares, and to convert it into a joint advance; (2) The advance being originally joint, to enable the money, after the death of one of the persons making the advance, to be paid to the survivors or the survivor, or his representatives, without inquiry whether the joint account had been severed, the clause operating in fact as a contract that a severance (if any) should not affect the right of the survivor to give a receipt. Both these objects are effected by the present s. The s. applies either where the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares, so that an expression of the joint account is not necessary, though it is convenient as a direct statement of the rights of the mortgagees. As between the mortgagees the joint account may be rebutted by evidence: *Re Jackson*, 34 Ch. D. 732.

Payment to one of the several joint creditors.

Payment to one of the joint creditors during the other's lifetime discharges the debt at law, but only discharges the security to the extent of the payee's beneficial interest, if any, though he ultimately becomes the survivor: *Powell* v. *Brodhurst*, 1901, 2 Ch. 160; and see *Matson* v. *Dennis*, 4 D. J. & S., 345; *Steeds* v. *S.*, 22 Q. B. D., 537. A joint account clause is not notice of a trust: *Re Harman &*

Uxbridge, &c. Ry. Co., 24 Ch. D. 720; but where a purchaser has notice that mortgage money is held on trust he is entitled to evidence that the mortgagees were the duly appointed trustees notwithstanding a joint account clause: *Re Blaiberg & Abrahams*, 1899, 2 Ch. 340. Where, on a mortgage to trustees, the trusts are kept off the title, a transfer to new trustees should, it is thought, be stamped with an *ad valorem* stamp. If the debt exceeds £2,000, the deed cannot be shown to have been properly stamped with a 10*s*. stamp under the Stamp Act, 1891, s. 62, without disclosing the trusts. Even if the 10*s*. stamp were adjudicated, it is questionable whether a purchaser would not have constructive notice that the transfer was made for effectuating an appointment of new trustees, as, though it is the practice to limit the duty on a transfer of a collateral security to 10*s*. (Alpe, 9th ed., 171), it would appear from the stamp on the mortgage transferred or by recitals whether it was in fact a collateral security or not; but see 49 Sol. J., 317. For the case where a married woman holds a mortgage security on trust, see n. to T. A., s. 16.

Notice of trusts.

Effect of 10*s*. stamp on a transfer of a trust mortgage.

Married woman mortgagee-trustee.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

Grant of easements, &c., by way of use.

(2.) This section applies only to conveyances made after the commencement of this Act.

The Statute of Uses, 27 Hen. VIII. c. 10, s. 1 (by force, as it seems, of the words, "of and in such like estates"), enabled *estates* only to be raised by way of use, and s. 5 enabled rent-charges to be raised by way of use. The statute does not contain any s. applicable to the creation of other interests *de novo* (see *Beaudely* v. *Brook*, Cro. Jac. 189; Bac. Ab. Uses, F.), but s. 1 enabled them, when created for a freehold interest, to be conveyed to uses, as being hereditaments. Consequently under a conveyance to uses or under a power of sale and exchange, a right of way or other easement or liberty could not be created, but if in existence could be conveyed to uses.

"Deriving title" means by and according to law, consequently this s. does not confer any new power of transmitting title, nor enable the creation of any new kind of easement, or make assignable that which before this Act was not by law assignable. For instance, a right of way in gross cannot be created capable of assignment; see *Ackroyd* v.

No new kind of easement can be created.

SS. 62, 63, 64, 65.

Smith, 10 C. B. 164. That there may be an "estate" in an incorporeal hereditament appears by the Statute of Uses, s. 5, which speaks of an estate in an annual rent.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

As to utilizing this s. for the purpose of attaching restrictive covenants to the fee simple, see *Key & Elphinstone*, 8th ed. vol. i. p. 316.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

"All estate" clause.

The object of this s. is to abolish the "all estate" clause, as to which see Elphinstone on Interpretation of Deeds, p. 204 *et seq.*; *Price* v. *John*, 1905, 1 Ch. 744. The s. does not say that every conveyance shall be deemed to contain this clause, which might be inconsistent with the terms of conveyance, as the word "conveyance" includes "lease" (see s. 2 (v.)). Even with an express "all estate" clause a lease could not pass the fee for want of the word "heirs" or "fee simple," and also because the premises would be controlled by the habendum: Co. Lit. 183 a; *Buckler's Case*, 2 Co. 55; Shep. Touch. 113.

For an example of the effect of this s. where the grantor who purported to convey the fee had only an equitable leasehold interest, see *Thellusson* v. *Liddard*, 1900, 2 Ch. 635.

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

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XIII.—LONG TERMS.

Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term which, as originally created, was for not less than three hundred years, is subsisting

in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

Presumption of release of a rent.

The Statute of Limitations, 3 & 4 Will. 4, c. 27, does not apply to rent reserved on a lease (*Grant* v. *Ellis*, 9 M. & W. 113; Sugden, Real Prop. Stat. 36, 63, 2nd ed., and see *Irish Land Commission* v. *Grant*, 10 A. C. 14, 26), but before that Act presumption from lapse of time operated as a bar in cases where the old Act did not apply: *Doe* v. *Prosser*, Cowper, 217; and it is conceived that the same principle would hold now, so that after non-payment of rent for a long period it would be presumed to have been released: see *Eldridge* v. *Knott*, Cowper, 214; and compare *Re Lidiard & Broadley*, 42 Ch. D. 254; *Ecclesiastical Commrs.* v. *Parr*, 1894, 2 Q. B. 420, 432.

"No money value."

A rent which, when received, has a money value, as a rent of three shillings, though it be not regularly paid, is not within this subs. (*Re Smith & Stott*, 29 Ch. D. 1009, n.); otherwise as to a rent of one silver penny if lawfully demanded: *Re Chapman & Hobbs*, *ib.* 1007.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

If the married woman was married after 1882, or if her beneficial interest in the term was acquired after 1882, she holds it as her separate property, whether so expressed or not, under the M. W. P. A., ss. 2 and 5, and her husband's concurrence is not necessary.

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(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

S. applies to cases where reversion has no appreciable value.

This s. enables the conversion into fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did exist the value of the reversion must be infinitesimally small at the time of conversion.

Old mode of acquiring fee.

Before the Act 8 & 9 Vict. c. 106 a tortious fee, and for all practical purposes an actual fee, could be acquired by means of a feoffment: see 1 Sand. Uses, 30, 5th ed.; 2 *ib.* 14 *et seq.* But s. 4 of that Act took away the tortious effect of a feoffment, and rendered impossible the acquisition of a fee in place of a term. The usual origin of a long term is a mortgage by demise where the right of redemption has been foreclosed or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it.

Who has power to convert.

The power to convert into a fee is given to "any person beneficially entitled" "to possession" (see definition of "possession," s. 2 (iii.)). Thus a tenant for life, legal or equitable, and whether the land is "subject to any incumbrance or not," can effect the conversion. A trustee can only convert where the trust is active and he is in receipt of rent. Otherwise the beneficial owner is the person to convert. Thus a trustee under the usual trust for sale and conversion in a will would be the proper person to effect a conversion, but not the trustee under a settlement holding the term on trusts corresponding to the limitation of the freeholds. There the equitable tenant for life would be the proper person.

Trustee.

A mortgagee cannot convert, as it would be improper to allow him to change the nature of his mortgagor's estate. But the mortgagor can convert, the conversion being no injury to the mortgagee.

Mortgagor but not mortgagee.

The effect of subs. 3 is to defeat the reversion in fee in the same way as on a disentail, so that the fee acquired by conversion is free from all dealings affecting the original fee.

Effect of conversion.

The term capable of being enlarged by this Act has been explained by the C. A., 1882, s. 11, which enacts—

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

It follows that if A. having a lease for 999 years at a substantial rent demised to B. for 500 years without rent, taking a fine, then neither A. under s. 65 of the Act of 1881, nor B. under s. 11 of the Act of 1882, could acquire the fee. The result would be the same if the lease for 999 years be not at a rent, but be liable to be determined by re-entry for condition broken. But if neither the lease nor the sub-lease be at a rent, nor be liable to be determined by re-entry for condition broken, then B. could acquire the fee, notwithstanding that his immediate reversion is not the freehold, and could thus defeat A.'s term. A. could also acquire the fee as being entitled to possession, which includes receipts of rents and profits, if any (s. 2 (iii.)), in right of his term (see s. 65 (2) (i.)), but having done so would be liable to have his estate defeated by the enlargement of B.'s term.

C. A., 1881, s. 65 continued.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

As to utilizing this subs. for the purpose of attaching restrictive covenants to the fee simple, see *Key & Elphinstone*, 8th ed. vol. i. p. 317.

(5.) But where any land so held for the residue of a

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term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

Where no dealing, tenure is changed;

Under subs. 5, where there has been no dealing for value with the ultimate beneficial interest in the term, and that interest has not become absolutely and indefeasibly vested (as where the term has been settled in the usual way, and no tenant in tail by purchase has attained twenty-one), the land on the enlargement of the term is for all purposes of descent, devise, &c., changed from leasehold to fee simple. It will no longer vest absolutely in the first tenant in tail who attains twenty-one, but will descend under the entail if not disentailed. This result is the same as that produced where leaseholds are sold under a power of sale and the proceeds invested in fee simple land.

contra where a conveyance for value.

Where there has been a conveyance for value the effect of that conveyance is preserved. Thus suppose the settlement to be on A. for life, remainder to his sons successively in tail, remainder to C. in tail, remainder to D. in fee, A. has no son of age, the term has not become absolutely and indefeasibly vested in any person, therefore the estate in fee simple acquired by enlargement should be conveyed to the uses of the settlement, and in the meantime will devolve accordingly as to the equitable interest. But C. will become absolutely entitled to the term in case A. dies without having a son who attains the age of twenty-one, or who dies under that age leaving issue inheritable; and if C. has mortgaged this contingent interest, then the mortgagee will take the fee obtained by enlargement in the same event in which he would have taken the term, but the equity of redemption will devolve under the entail. If a son of A. attains twenty-one before the enlargement is effected, then he becomes absolutely and indefeasibly entitled to the term, and this subs. 5 does not apply, but under subs. 4 the fee acquired is subject to the same trusts as the term, that is, a trust for the son absolutely, and no disentail is required. Under a will the land will pass as freehold or leasehold, according to its tenure at the time of the testator's death.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

Subs. 6 in effect gives to the owner of a fee simple obtained by enlargement the right to the mines in fee simple as well as the land, except in those cases where there is a possibility that the mines can be shown to be vested in some other person than the reversioner in fee.

Saves the right to mines not vested in surface owner.

Mines severed in right (as by conveyance separately from the land) will also be severed in fact, but the words "in fact" seem also required to save the title of a person in possession of mines without obliging him to show that they have been severed in right.

XIV.—ADOPTION OF ACT.

ADOPTION OF ACT.

Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

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ADOPTION OF ACT.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

Solicitor's responsibility in reference to adoption of the Act.

Under this s. a solicitor adopting the Act and framing his drafts so as to incorporate the forms contained in the Act, or so as not to exclude any provisions of the Act, incurs no responsibility, those forms and provisions being by this s. declared proper. The same holds as to a trustee or executor. If he uses other forms his responsibility remains the same as before the Act.

Adoption by trustees.

Having regard to subs. 3, trustees and executors will probably always require the Act to be adopted, thereby obtaining express statutory protection.

MISCELLANEOUS.

XV.—MISCELLANEOUS.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case

of a mining lease, is left for the lessee at the office or counting-house of the mine.

See *Cronin* v. *Rogers*, 1 Cab. & Ell. 348; and the form of the notices in *Lock* v. *Pearce*, 1892, 2 Ch. 328. See also *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267, 276.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

"Ordinary course."

Delivery under some special arrangement, though a permanent one, with the post-office authorities is not a delivery "in the ordinary course," so as to postpone the statutory date of service: *Kemp* v. *Wanklyn*, 1894, 1 Q. B. 583. Where there is no delivery "in the ordinary course," service by registered letter is not good: *Lewis* v. *Evans*, L. R. 10 C. P. 297.

(5.) This section does not apply to notices served in proceedings in the Court.

Service on mortgagor.

As to service on mortgagor of notice to sell by mortgagee, see note to s. 20 (i.).

Short title of 5 & 6 Will. 4, c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

The object of this s. is to render unnecessary the long and cumbrous title of the Act referred to. The Form given in the schedule to that Act will now run thus: I, A. B., do solemnly . . . and by virtue of the provisions of the Statutory Declarations Act, 1835.

See also the Short Titles Act, 1896, schedule 1.

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COURT; PROCEDURE; ORDERS.

XVI.—COURT; PROCEDURE; ORDERS.

Regulations respecting payments into Court and applications.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

As to the bearing of this subs. on applications for relief under s. 14 (2), by lessee in a lessor's action brought in the Q. B. D., see *Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254.

County court.

The county courts have no jurisdiction: *Lock* v. *Pearce*, 1893, 2 Ch. 271, 275, 278–9; but see note to s. 70.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

It has been held that this subs. is obligatory: *Re Lillwall's Trusts*, 30 W. R. 243, W. N., 1882, 6; *Latham* v. *L.*, W. N., 1889, 171; but see *Re Blundell*, 1901, 2 Ch. 223 (*n*).

Relief against forfeiture.

But it does not extend to the case of the action which, under s. 14 (2), a lessee may bring for relief against forfeiture; this must be instituted by writ, not by originating summons: see *Lock* v. *Pearce*, *sup.* And as to the lessee's mode of proceeding, under s. 14 (2), in the lessor's action, see *Cholmeley's School* v. *Sewell*, *sup.*; and see R. S. C., 1883, O. 70, r. 1, and *Re Martin & Varlow*, W. N., 1894, 223.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

"Costs, charges, or expenses."

Compare S. L. A., s. 46 (6), and *Re Smith's S. E.*, 1891, 3 Ch. 65, pp. 72–6.

39 & 40 Vict. c. 59, s. 17.

(8.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the

Appellate Jurisdiction Act, 1876, and may be made accordingly.

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See also Supreme Court of Judicature Act, 1881, s. 19; Supreme Court of Judicature (Procedure) Act, 1894, s. 4.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

Durham Palatine Court and Lancaster Court Rules.

As to exercise of the powers of the Court, in respect of land in Durham, by the Palatine Court there, see Palatine Court of Durham Act, 1889, s. 10.

As to power to make rules for the Court of Chancery of Lancaster, see Chancery of Lancaster Act, 1890, s. 6.

And as to rules for inferior courts generally, see now Supreme Court of Judicature Act, 1884, s. 24.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Applies to orders of the old Courts.

"Court" is defined, s. 2 (xviii.), as "Her Majesty's High Court of Justice," which is a division of the Supreme Court which includes the old Courts of Chancery and Common Law (Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 3, 4), all united into one Court, so that this s. applies to all orders of the old Courts.

Whether an order of a County Court or a Palatine Court under such enactments as s. 69 (9) *sup.*, the County Courts Act, 1888, s. 67, or the S. L. A., s. 46 (8) & (10), by which powers *of the High Court* are made exerciseable by the inferior Court, is an order *of the Court* within this s. *qu.*, and see *Re Bowling & Welby*, 1895, 1 Ch. 663.

S. 70.

COURT; PROCEDURE; ORDERS.

40 & 41 Vict. c. 18, s. 40.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

What matters covered by this s.

It is assumed the Court has made an order under its jurisdiction, and the words "shall not be invalidated on the ground of want of jurisdiction" are introduced to cover any irregularity of procedure, which might possibly affect the jurisdiction, and invalidate the order: per Lindley, M.R., in *Jones* v. *Barnett*, 1900, 1 Ch. 370, at p. 374. The Court will not exercise its jurisdiction with less care than before: *Re Montagu*, 1897, 2 Ch. 8, 11.

This s. has an important effect in making valid titles under sales by the Court. The order for sale is made conclusive in favour of a purchaser as to jurisdiction (for instance, to sell part of a settled estate for any purpose) and as to consent (as of a respondent in a petition under the S. E. A.), notice or service (as where a party to an action or a person served with notice of judgment in an action does not appear). It is also conclusive in favour of a purchaser as to dispensing with the concurrence or consent of persons entitled, whether the objection to the order appears on the face of it or not: *Re Hall Dare*, 21 Ch. D. 41; see also *Mostyn* v. *M.*, 1893, 3 Ch. 376; *Re Whitham*, 84 L. T. 585; 1901, W. N. 86; *Re Harrowby & Paine*, 1902, W. N. 137. But the s. does not operate to give a good title to a purchaser at a sale under an order of the Court, where the Court supposed it was dealing with an interest belonging to one person, which in fact belonged to another person, not a party to or bound by the proceedings: *Jones* v. *Barnett*, *sup.*

"Purchaser" in this Act includes a lessee or mortgagee: s. 2 (viii.).

How far retrospective.

Subss. 2 & 3 give this s. an important retrospective effect by making valid every past lease or sale under the Settled Estates Acts of 1856 and 1877, where no proceedings have been taken to question the sale, notwithstanding that there has been in fact an omission to obtain the required consent under s. 28 of the first Act, or s. 40 of the second Act.

XVII.—REPEALS.

REPEALS.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

Powers under Lord Cranworth's Act preserved.

Subs. 2 preserves to the full extent the power of sale given by Lord Cranworth's Act in cases of mortgages prior to 1882. The "operation or effect" of the mortgage was under that Act to give every mortgagee a power of sale unless otherwise agreed, and as a "consequence" he could sell. This "operation, effect, or consequence" is not to be affected by the repeal of this Act: see *Re Solomon & Meagher*, 40 Ch. D. 508.

As to the effect of the repeals in this s., see *Quilter* v. *Mapleson*, 9 Q. B. D. 675, 677; *Re Dickson*, 29 Ch. D. 331, 338, 340.

XVIII.—IRELAND.

IRELAND.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court *of Justice* in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

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IRELAND.

(4.) The proper office of the Supreme Court *of Judicature* in Ireland shall be substituted for the central office of the Supreme Court *of Judicature.*

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

40 & 41 Vict. c. 57, s. 69.

The words in italics were repealed by the Statute Law Revision Act, 1898.

Death of bare trustee intestate, &c.

37 & 38 Vict. c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED (a).

PART I.

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rent-charges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

(a) The Acts in Part I. of this schedule were affected only by ss. of the Bill struck out in the House of Commons, and the reference to them here should also have been struck out (see Preface to the first edition). But those ss. are now included in s. 2 of the C. A., 1882; and the latter section refers (see subs. 1) to Part I. of this schedule; see also s. 17 of the Land Charges Registration & Searches Act, 1888, *inf.*, Part II. Ch. I.

S. 72, 7

IRE

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35. In part.	An Act to further amend the law of property and to relieve trustees . . . . . Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126. In part.	The Common Law Procedure Act, 1860 . . . . . Section two.	in part; namely,—

PART II.

15 & 16 Vict. c. 86. In part.	An Act to amend the practice and course of proceedings in the High Court of Chancery Section forty-eight.	in part; namely,—

PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property. (*a*)
23 & 24 Vict. c. 145. In part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills . . . . in part; namely,— Parts II. and III. (sections eleven to thirty). (*b*)

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

(*a*) This is one of the Acts known as Lord Brougham's Acts; the other (8 & 9 Vict. c. 124), for shortening leases, is still unrepealed.

(*b*) Parts I. and IV. of the Act here referred to have since been repealed by the S. L. A., 1882, s. 64, but the powers given by ss. 8 and 9 included in Part I. are now supplied by the T. A., s. 19.

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of

the said mortgage as the mortgage money and no interest is now due and payable thereon. AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage. NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** *Variations as noted above.*

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the person claiming under him. AND *A.* hereby covenants with *B.* (*a*) as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of

(*a*) This should be "*B.* and *C.*"

money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And A. hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.

To contain lists of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rent-charge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rent-charge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple. [*Insert trusts of term of* 500 *years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition* (*a*), *and other powers and provisions, if and as desired.*]

In witness &c.

(*a*) Powers of sale, exchange, partition, enfranchisement, and leasing are now supplied by the S. L. A.'s, 1882 to 1890, and should be omitted.

CHAPTER IV.

THE CONVEYANCING ACT, 1882.
45 & 46 VICT. c. 39.

An Act for further improving the Practice of Conveyancing; and for other Purposes. [10 August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

S. 1.

Preliminary.

Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

What ss. retrospective.

Ss. 3–6, and s. 7, subs. 3, and s. 11 are retrospective, except in case of s. 3 as to pending actions.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an

SS. 1, 2.

Preliminary.

intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

3 & 4 Will. 4, c. 74.

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and "Recoveries, and for the substitution of more "simple modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for "the abolition of Fines and Recoveries, and "for the substitution of more simple modes of "Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

4 & 5 Will. 4, c. 92.

Searches.

Searches.

Official negative and other certificates of searches for judgments, Crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

Search not usual for enrolled deeds.

In respect to deeds this s. applies to those of which *entries* only are made, as, for instance, a deed creating a rent-charge; it does not apply to deeds *enrolled* under any Act or statutory rule (see subs. 11 and note). A search would not usually be made for deeds so enrolled. But search for disentailing deeds may in some cases be necessary: see Part II. Ch. IV. for searches generally.

For rules relating to the Central Office, see R. S. C., 1883, O. 61; and as to searches, *ib.*, r. 23.

Searches in Land Registry.

The provisions of this s. are extended to searches in the registers at the Land Registry under the Land Charges Registration and Searches Act, 1888: see s. 17 of that Act, *inf.*, Part II. Ch. I.; and under s. 1 of the Land Charges Act, 1900, and the order of the 3rd August, 1900,

made pursuant thereto (see Part II. Ch. III.) the registers of judgments, *lis pendens*, Crown debts, executions and annuities have been transferred from the Central Office to the Office of Land Registry.

And see, as to Middlesex Deeds, Land Registry (Middlesex Deeds) Act, 1891, Sched. 1, r. 11. As regards official searches in respect of registered land, see L. T. R., 1903, rr. 289, 293.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

See definition of purchaser, s. 1 (4), (ii.).

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the *Commissioners of Her Majesty's* Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

See the rules under this s., Ch. V., *inf.*

SS. 2, 3.

Searches.

The words in italics were repealed by the Statute Law Revision Act, 1898.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

3 & 4 Will. 4, c. 74.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

See now R. S. C., 1883, O. 61 r. 23.

(12.) This section does not extend to Ireland.

Notice.

Restriction on constructive notice.

Notice.

3.—(1.) A purchaser shall not be prejudically affected by notice of any instrument, fact, or thing, unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a

question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

"The law as to notice now depends upon this s.," per Cozens-Hardy, J., in *Hunt* v. *Luck*, 1902, 1 Ch. 428, 430; and see *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487, 495, 497.

Reasonable inquiries.

"If such inquiries, &c." See *Gainsborough* v. *Watcombe Co.*, 53 L. T. 116; *Bailey* v. *Barnes*, 1894, 1 Ch. 25; *Taylor* v. *London & County Bank*, 1901, 2 Ch. 231; *Re Alms Corn Charity, ib.* 750; *Hunt* v. *Luck, sup.*; *Holloway Brothers, Ltd.* v. *Hill*, 1902, 2 Ch. 612, 620; *Rowell* v. *Satchell*, 1903, 2 Ch. 212, 221; *Bateman* v. *Hunt*, 1904, 2 K. B., 530, 540; and *cf. Re A. W. Hall & Co.*, 37 Ch. D. 712; *English &c. Company* v. *Brunton*, 1892, 2 Q. B. 1: *ib.* 700.

Occupation by tenant.

The occupation of land by a tenant does not affect a purchaser with constructive notice of the lessor's title or rights: *Hunt* v. *Luck*, sup.

Notice to solicitor.

"In the same transaction;" these words prevent constructive notice under such circumstances as those in *Hargreaves* v. *Rothwell*, 1 Keen, 154; see *Re Cousins*, 31 Ch. D. 671; *Taylor* v. *London & County Bank, sup.*

Omission to make inquiries.

A purchaser cannot avoid constructive notice by omitting to investigate the title, even though the law under an open contract precludes investigation: *Patman* v. *Harland*, 17 Ch. D. 353; *Dunning* v. *E. of Gainsborough*, W. N., 1885, 110; *Re Cox & Neve*, 1891, 2 Ch. 109; *Bailey* v. *Barnes, sup.*; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; nor by omitting to require production of the deeds: *Oliver* v. *Hinton*, 1899, 2 Ch. 264; *Berwick* v. *Price*, 1905, 1 Ch. 632. Under subs. 2 there will be the same equitable remedy by injunction as before the Act.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

Purchaser must inquire.

The effect of this subs. seems to be that a purchaser of the fee simple will be bound by provisions in any deed forming part of the

S. 3.

Notice.

title unless he escapes as a purchaser without notice. The cases in the last note show that he will not so escape if he knows, or ought to know, of the deed, though he may not know its contents; and see *English &c. Co.* v. *Brunton*, 1892, 2 Q. B. 700, which suggests (pp. 708, 713–14) a distinction between the purchase of land and that of personal property, and also takes a distinction between documents which must, and those which may or may not, relate to the subject-matter, and decides that mere knowledge of the existence of the latter does not necessarily amount to constructive notice of their contents. If the title is furnished on an open contract, and commences with a deed of the proper kind forty years old, having no recitals, he is bound, under the V. & P. A., s. 1, to accept this, and takes, it is conceived, without notice of any prior deed. If that deed recites prior deeds, and the recitals throw any suspicion on the title, it would seem that the commencement of the title is not carried back to "the time prescribed by law for commencement of title" (see C. A., s. 3 (3), and note thereon, *sup.*), and that the purchaser is not prevented by either of the last-mentioned ss. from requiring the earlier title, and is fixed with notice of it if he does not inquire, or, on inquiry, does not get satisfactory explanation.

Where, by contract between the parties, the time for commencement of title is "stipulated" (see C. A., s. 3 (3)), but if left as "prescribed by law," would have extended over a stage in the title disclosing some defect, there the purchaser must take the consequences of contracting himself out of the right to travel through that stage: *Re Cox & Neve*, 1891, 2 Ch. 109; *Re Nisbet & Potts*, 1905, 1 Ch. 391.

As regards s. 3, subss. 1 and 2, of the C. A., the title would not be in the possession of the vendor, and it is open to the purchaser to apply for it at his own expense. If he does not, this subs. prevents his gaining any assistance from this s. If he does all he can to obtain production and fails, it is conceived he is, under this s., free from constructive notice of what is not disclosed. So also a lessee gains no benefit by this s. if he does not inquire into his landlord's title. Also a sub-lessee will, under this subs., take subject to all the provisions of the superior lease, even though his lessor should show a title and profess to lease as freeholder. The leasehold interest is bound legally and not merely equitably, and purchase for value without notice is no defence.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act; *save that, where an action is pending at the commencement*

of this Act, the rights of the parties shall not be affected by this section.

SS. 3, 4, 5, 6.

Notice.

The words in italics were repealed by the Statute Law Revision Act, 1898.

Leases.

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

Effect of s. 4

The effect of this s. is to prevent a purchaser of the lease after it is granted, requiring as part of his title an abstract and production of the contract under which it was granted; thus placing the contract in the same position as a document showing the freeholder's title under V. & P. A., s. 2.

Separate Trustees.

Separate Trustees.

Appointment of separate sets of trustees.

5.—(1.) *On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be appointed for the first-mentioned part.*

(2.) *This section applies to trusts created either before or after the commencement of this Act.*

This s. was amended by s. 6 of C. A., 1892; and, with the amending s., repealed by the T. A., s. 10 of that Act taking their place.

See, on this s., *Re Paine*, 28 Ch. D. 725; *Re Gregson*, 34 *ib.* 209; *Re Hetherington*, *ib.* 211; *Savile* v. *Couper*, 36 *ib.* 520; *Re Moss*, 37 *ib.* 513; and note that, where orders were made, they were under the T. A.'s: see also *Re Nesbit*, 19 L. R. Ir. 509.

Powers.

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim

SS. 6, 7.

Powers.

the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

"By trustees."

It will be observed that the marginal note applies to disclaimer by trustees only; but the words of the s. are unlimited, and the marginal note cannot limit them: see *A. G.* v. *G.E.R. Co.*, 11 Ch. D. 449, at pp. 460–1, 465.

Disclaimer of powers.

C. A., s. 52, enables the release of a power whether coupled with an interest or not (unless it is coupled with a duty), thereby extinguishing it, so that several trustees concurring can absolutely preclude themselves from ever exercising the power, but it does not enable one trustee alone to disclaim as he could disclaim a trust estate, so as to vest the power in the other trustees. This s. puts disclaimer of a power on the same footing as disclaimer of an estate: see Sugd. Powers, 50, 8th ed.; *Re Fisher & Haslett*, 13 L. R. Ir. 546. A trustee cannot disclaim a power, coupled with a duty, so as to vest it in his co-trustees, while he continues a trustee for other purposes: *Re Eyre*, 49 L. T. N. S. 259.

It would seem this s. applies to the case of the joint powers given to husband and wife in an ordinary marriage settlement, where the husband disclaims, unless it is a power coupled with a duty (see note to s. 52 of the C. A.), or unless it were held that they, as parties to the settlement, have accepted the powers and so cannot disclaim; see *Burnaby* v. *Baillie*, 42 Ch. D. 282, 301.

S. L. A. powers.

As to disclaimer of powers under the S. L. A.'s, 1882 to 1890, see S. L. A., s. 50, n.

Married Women.

Acknowledgment of deeds by married women.

Married Women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines

S. 7.

Married Women.

and Recoveries Act, and in section seventy-four of the Fines and Recoveries (Ireland) Act, there shall by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

"Other enactments," *e.g.* Malins' Act, 20 & 21 Vict. c. 57.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

S. 84 of the English Fines and Recoveries Act as amended, is set out after the schedule to this Act. The new form of memorandum is given in R. S. C. of December, 1882, in the next chapter.

Effect of s. 7,

The effect of this s. (including the repeal therein) is:

1. To substitute one perpetual or special commissioner in place of two.
2. To make a memorandum of acknowledgment indorsed on the deed sufficient, without any separate certificate to be filed.

and of M. W. P. A.

But under the M. W. P. A. every woman married after 1882, and every other married woman, as to property acquired after that year, is—except where she is a trustee—in the position of a *feme sole*, and can convey without any acknowledgment: *Re Drummond & Davie*, 1891, 1 Ch. 524.

See the effect of a married woman's acknowledgment and separate examination discussed in *Tennent* v. *Welch*, 37 Ch. D. 622, and in *Cahill* v. *C.*, 8 A. C. 420, 428, 441; and with reference to a declaration of trust, see *Carter* v. *C.*, 1896, 1 Ch. 62.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court *of Justice* in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman,

S. 7.

Married Women.

or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, *and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.*

39 & 40 Vict. c. 59.

44 & 45 Vict. c. 68.

40 & 41 Vict. c. 57.

See, for rules under this subs., the next chapter.

(4.) *The enactments described in the schedule to this Act are hereby repealed.*

(5.) *The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.*

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner, and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found

convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

SS. 7, 8.

Married Women.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

The words and subss. in italics were repealed by the Statute Law Revision Act, 1898.

See form of requisition for an official search for certificates of acknowledgments, R. S. C. of December, 1882, in the next chapter.

Subs. 3 applies to deeds *acknowledged* before or after the end of 1882, and subs. 5 applies to the *execution* of deeds after 1882. So far as regards the interest of the person since the Act, or of either of the persons before the Act, taking an acknowledgment, the deed is unimpeachable, whether executed before or after 1882. But so far as regards the manner of acknowledgment, the Act applies only to deeds executed after 1882.

Certificates lodged after the commencement of the Act and referred to in subs. 7, necessarily mean the certificates of acknowledgments taken but not lodged before the Act: see the repealed ss. of the Fines and Recoveries Act in the schedule. An index of certificates of acknowledgment has still to be kept, to enable searches in regard to deeds executed before the Act.

As to examinations of married women for purposes of the L. T. A.'s: see L. T. R. 1903, 338–340.

Powers of Attorney.

Powers of Attorney.

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as

S. 8.

Powers of Attorney.

valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Powers of attorney given for value.

This s. relates only to powers of attorney given for value, and enables a power of that kind to take the place of an actual transfer, but it is conceived that the attorney must be a person named, and that the power lapses by his death. He may, however, be empowered to appoint substitutes. A person desiring to give a security may, in consideration of the loan, give an irrevocable power to transfer, or convey, or sell, thus enabling the lender to realize his security, if he so requires. When the loan is repaid the power may be cancelled, and a transfer and re-transfer are thus avoided. The person taking the power must use all the same precautions as if he had taken an actual transfer, so as to prevent another transferee taking without notice. In the case of land, for instance, he must obtain the deeds.

Winding-up of Company.

"Bankruptcy" includes proceedings for winding-up a Company (see n. on C. A., s. 2 (xv.)). Apart from this s. notice of winding-up proceedings is of itself revocation of a power of attorney given by a Company—at all events where the winding-up is by the Court, or under its supervision, and where it is proposed to make any disposition, under the power, of the Company's property: see s. 153 of the Companies Act, 1862, and *Re Oriental Bank*, 28 Ch. D. 634, 640. The result may be different in a voluntary winding-up (see ss. 131, 133, and *Hire Purchase Furnishing Co.* v. *Richens*, 20 Q. B. D. 387).

Trustees.

It may be questioned whether a trustee, who, in special cases, may act by attorney (see *Re Bellamy & Metropolitan Board of Works*, 24 Ch. D. 387, 400, 403–4; *Re Hetling & Merton*, 1893, 3 Ch. 269, 280), is entitled to give an irrevocable power under this or the following s. The power is fairly workable under C. A., s. 47; and to make it irrevocable paralyzes the trustee's discretion.

S. 9.

Powers of Attorney.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Power of attorney not given for value.

This s. includes powers of attorney not given for value, as, for instance, where a person going abroad desires to give a power to sell property. The main difficulty hitherto has been that in order to make a complete title it was necessary to ascertain that the principal was living when the transfer under the power was made. In order to avoid this, the only course was to make an actual transfer on trust for sale. If no sale was made, a re-transfer became necessary, thus in the case of land putting two deeds on the title. This s. and s. 8 are supplementary to C. A., ss. 46, 47.

SS. 9, 10.

Powers of Attorney.

Execution by attorney.

Though not necessary since the C. A., s. 46, it is usual and proper that the attorney should sign the principal's name and express the deed to be signed, sealed, and delivered by the attorney, naming him. The principal is named and described amongst the parties as if he himself executed, and no other reference is made to the attorney or the power, except in the signature and attestation clause (see as to execution by an attorney, *Coombes' Case*, 5 (Pt. ix.) Co. Rep. 77a; *Frontin* v. *Small*, 2 Lord Raym. 1418; *Wilks* v. *Back*, 2 East, 142; also *Lawrie* v. *Lees*, 14 Ch. D. 249, 7 A. C. 19, where, though the attorneys executed in their own names, the inference was that they did so on behalf of their principal: 7 A. C. 28, per Lord Penzance.)

Executory Limitations.

Restriction on executory limitations.

Executory Limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Executory limitations assimilated to strict settlement.

An executory limitation generally prevented alienation for a longer period than an ordinary strict settlement. Thus under a devise "to A. in fee simple, and if he die without issue living at his death to B. in fee simple," with further limitations over of the same kind, it was necessary that all the persons named should concur in a sale, whereas in case of an ordinary strict settlement on the several persons named and their issue, A. with his son, when of age, can bar the entail and sell. This s. enables A. alone to sell when any child or other issue of his attains twenty-one. The limitations over becoming barred in the same event in which the entail under a strict settlement could be barred. The s. gives no estate to the issue, but simply gives A. in his lifetime, when a child or other issue of his attains twenty-one, the same complete power of disposition as independently of the Act he would acquire at his death if a child or other issue of his were then living.

This s. applies in the case of a gift over on death without children,

if these words are construed to mean "without leaving children": *Re Booth*, 1900, 1 Ch. 768.

This s. only applies to an estate in fee or for life, or a term of years absolute or determinable with life.

SS. 10, 11, 12, 13.

Executory Limitations.

Long Terms.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See notes on C. A., s. 65.

Mortgages.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

See notes on C. A., s. 15.

Saving.

Saving.

Restriction on repeals in this Act.

13. *The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same*

S. 13.
Saving.

affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

See notes on C. A., s. 71.

This s. was repealed by the Statute Law Revision Act, 1898.

SCHEDULE.

Section 7 (4).

(*Repealed by the Statute Law Revision Act*, 1898.)

REPEALS.

3 & 4 Will. 4, c. 74. In part.	The Fines and Recoveries Act . } in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section. Sections eighty-five to eighty-eight, inclusive.
4 & 5 Will. 4, c. 92. In part.	The Fines and Recoveries (Ireland) Act . . } in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75.	An Act to remove doubts concerning the due acknowledgment of deeds by married women in certain cases.
41 & 42 Vict. c. 23.	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

S. 84 of the English Fines and Recoveries Act as it now stands, consequent on s. 7 (1) of C. A., 1882, and the above repeal, is as follows:

LXXXIV. When a married woman shall acknowledge any such deed as aforesaid, the Judge, Master in Chancery, or Commissioner taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect: *videlicet* [*the form to be now used is given in R. S. C. of December*, 1882, *in the next chapter*.

CHAPTER V.

RULES OF THE SUPREME COURT UNDER THE FINES AND RECOVERIES ACT AND THE CONVEYANCING ACTS, 1881, 1882 (DECEMBER, 1882).

SECT. I.

Rules under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these Rules referred to as the Fines and Recoveries Act), to take the acknowledgments of deeds by married women, shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a Commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot or at the back thereof.

"Whether she intends . . . made for her." As to validity and effect of this rule: see *Tennent* v. *Welch*, 37 Ch. D. 622 (a case on an acknowledgment under the old rules of 1834), at pp. 629–30, 632–3, 635–6.

3. The memorandum to be endorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:—

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:—

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A.B.*

A Judge of the High Court of Justice in England,

or a Judge of the County Court of

or a perpetual Commissioner for taking acknowledgments of deeds by married women.

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of

acknowledgments of deeds by married women and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. [*Provides for certain costs.*]

9. [*Repeals existing rules and orders, except as to certain certificates not lodged before the 1st January*, 1883.]

10. These rules shall take effect from and after the 31st December, 1882.

SECT. II.

Rules under Section 2 of the Conveyancing Act, 1882. (*a*)

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the

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(*a*) These rules should be read in connexion with R. S. C. 1883, Order 61, Rule 9, which provides that—

All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice, may be enrolled in the Enrolment Department of the Central Office;

And with Rule 23 of the same Order, which provides that—

The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

The business of the Registrar of Judgments is now transferred to the office of Land Registry; see s. 1 of the Land Charges Act, 1900, Part II., Ch. III., *inf.*

person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate, and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

Rule under the Conveyancing and Law of Property Act, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the Office. (*b*)

(*b*) See C. A., s. 48 (3), and the note thereon.

APPENDIX.

FORM I.

DECLARATIONS BY SEPARATE INSTRUMENTS AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature,
Central Office.

To the Clerk of Enrolments,
or The Registrar of,
Royal Courts of Justice, London.

In the Matter of *A.B.* and *C.D.*

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

Signature,
Address, and
Description

Dated

FORM II.

DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

FORM III.

REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE (*a*) UNDER THE CONVEYANCING ACT, 1882, s. 2. (*b*)

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Clerk of Enrolments,
Royal Courts of Justice, London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from to , both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search

Dated

(*a*) Now the Enrolment Department of the Central Office: see R.S.C., 1883, O. 61, r. 9.

(*b*) But see that s., subs. 11, and note on "Enrolled Deeds," Part II., Ch. IV., *inf.*

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale.
Royal Courts of Justice, London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from to , both inclusive, in the following name (*or* names).

(*Schedule and conclusion; as in* Form III.)

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women,
Royal Courts of Justice, London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by

Married Women during the period from to , both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(*Conclusion; as in* Form III.)

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

[This Form is superseded by Form 5 now in use under the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900. See Part II., Chap. II., *inf.*]

FORM VII.

CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in

the name [*or* names] of , for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name [*or* in any one or more of those names] during the period aforesaid, *or* and that except the described in the schedule hereto no deed or document has been enrolled in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

CERTIFICATE OF SEARCH BY THE REGISTRAR of BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name [*or* names] of , for the period from to both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during that period, *or*, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

FORM IX.

CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Registry of Certificates of Acknowledgment of Deeds by Married Women.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name [*or* names] of , for the period from , to , both inclusive, for a certificate dated the , *or* for certificates of acknowledgment of a deed dated the , *or* for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the Requisition*), and that no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid, *or* and that except the certificate [*or* certificates] described in the Schedule hereto, no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 19

FORM X.

CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEYANCING ACT, 1882, s. 2.

[This Form is superseded by Form 7 now in use under the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900. See Part II., Chap. II., *inf.*]

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office.

Requisition for Continuation of Search.

To the Clerk of Enrolments,
or The Registrar of
Royal Courts of Justice, London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of , in the name [*or* names] of , from the day of to the day of , both inclusive.

Signature, address, and description of person requiring the search }

Dated .

FORM XII.

CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, S. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search [*or* searches] mentioned in the within-written certificate has [*or* have] been diligently continued to the day of , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered or re-registered as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity, has been registered or re-registered in the within-mentioned name [*or* in any one or more of the within-mentioned names].

Dated .

CHAPTER VI.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892. 55 & 56 VICT. c. 13.

An Act to amend the Conveyancing and Law of Property Act, 1881. [20th June, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

SS. 1, 2.

Preliminary.

Short title and extent. 44 & 45 Vict. c. 41. 45 & 46 Vict. c. 39.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

The three Acts may be cited as the "Conveyancing Acts, 1881 to 1892"; Short Titles Act, 1896.

(2.) This Act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

Costs of waiver, and forfeiture in case of bankruptcy or execution.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by

writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act. S. 2.

Costs in reference to breach.

In *Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 542, the Court of Appeal held a lessee not liable to pay to his lessors (plaintiffs in an action for ejectment), as compensation for breach of a covenant in the lease, the lessors' costs of employing a solicitor and surveyor in the preparation and service of the notice required by C. A., s. 14 (1). This amending subs. gives a lessor, in the cases where it applies, a right of action for such costs.

It is conceived that, independently of the amending subs., the Court has power, where the lessee is applying for relief (in *Skinners' Co.* v. *Knight* he was not), to make the payment, by the lessee, of such costs, a term of the relief, under C. A., s. 14 (2); or to order their payment, by the lessee, as "charges or expenses" under C. A., s. 69 (7): compare *Re Smith's S. E.*, 1891, 3 Ch. 65, pp. 73–5, a decision on S. L. A., s. 46 (6).

"Lessee."

Notwithstanding C. A., s. 14 (3), "lessee" does not include an under-lessee except as against his own under-lessor; that subs. is to be construed only so as to make the provisions of C. A., s. 14—as amended by C. A., 1892—applicable as between a derivative lessor and his lessee, as well as between the head lessor and his lessee: see *Nind* v. *Nineteenth Century Bldg. Socy.*, 1894, 2 Q. B. 226.

"Relieved."

The lessee is not "relieved" unless there is some intervention of the Court under C. A., s. 14 (2): see S. C. The decision in *Skinners' Co.* v. *Knight, sup.*, does not affect the discretion of the Court as to lessor's costs under C. A., s. 14 (2): *Bridge* v. *Quick*, 61 L. J. Q. B. 375.

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

(3.) Sub-section two of this section is not to apply to any lease of—

(*a*) Agricultural or pastoral land:

(*b*) Mines or minerals:

(*c*) A house used or intended to be used as a public-house or beershop:

SS. 2, 3, 4.

(*d*) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures:

(*e*) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

See on subs. 2, *Horsey Estate, Ltd.* v. *Steiger*, 1889, 2 Q. B. 79; and see also note to C. A., s. 14 (6).

No fine to be exacted for licence to assign.

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Forfeiture for assigning without leave.

This s. does not affect the principle of the decision in *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417, that the Court can give no relief against forfeiture, where there has been an assignment without licence or consent.

"No fine . . . shall be payable:" the deposit of a sum of money for securing performance of a building contract which included other property besides that for which the licence was asked, is not within this s.: see *Re Cosh*, 1897, 1 Ch. 9.

Power of Court to protect underlessees on forfeiture of superior leases.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the

lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease. S. 4.

"Is proceeding."

The under-lessee must apply for relief before the lessor has re-entered: see *Rogers* v. *Rice*, 1892, 2 Ch. 170.

"Or otherwise," *i.e.* by peaceable entry; *Re Riggs*, 1901, 2 K. B. 16.

It may happen that proceedings are carried through to execution before the under-lessee—who may be a mere mortgagee, not in possession—hears of them; and query, if in such a case, the Court would set aside the execution, and give the under-lessee leave to defend: see *Rogers* v. *Rice*, *sup.*

Application by under-lessee.

The under-lessee's application may be by way of counterclaim in the lessor's action, though brought in the Q. B. D.: see *Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254; and see n. to C. A., s. 14 (2).

Relief.

This s. is not a mere amendment of s. 14 of the C. A., and under it relief can be given to an under-lessee against a forfeiture of the head lease for non-payment of rent: *Gray* v. *Bonsall*, 1904, 1 K. B. 601. And wider relief may be given under this s. to an under-lessee than the lessee could ask. In *Cholmeley's School* v. *Sewell*, *sup.*, the lessor relied on a forfeiture by the lessee's bankruptcy. The property was a public house, so that the lessee could not have got relief under s. 2 (2) of this Act, by reason of subs. 3 (*c*); but it was held in the same case (1894, 2 Q. B. 906) that this s. nevertheless authorized relief to the under-lessee. And this ruling was confirmed by the C. A. in *Imray* v. *Oakshette*, 1897, 2 Q. B. 218. And see that case as to the cases in which relief will be refused.

"Payment of rent."

In fixing the terms of the new lease to be granted to the under-lessee, the Court has power to vary the rent reserved by the original under-lease: *Ewart* v. *Fryer*, 1901, 1 Ch. 499; and see generally as to the terms of relief, *London &c. Company* v. *Thomson*, 89 L. T. 50.

Terms of vesting order.

The powers of the Court, under this s., in relation to the terms of the vesting order, seem far wider than those under similar provisions in the Bankruptcy Acts, 1883 and 1890 (see s. 55 of the former Act, and s. 13 of the latter; and *Re Finley*, 21 Q. B. D. 475; *Re Smith*, 25 *ib.* 536); and see as to the extent, and the mode of exercise, of those powers, *Cholmeley's School* v. *Sewell*, 1894, 2 Q. B. 906; *Ewart* v. *Fryer*, *sup.*

SS. 4, 5, 6.

Interest given by vesting order.

It is conceived that where, as in *Cholmeley's School* v. *Sewell*, *sup.*, judgment is given for the lessor, coupled with an order vesting the property in the under-lessee for the length of his sub-term, his original sub-term is gone by the forfeiture (see *G. W. R. Co.* v. *Smith*, 2 Ch. D., 235, at p. 253); and that a new term is created by the vesting order, in respect of which the under-lessee must give the lessor proper covenants, and a proper condition of re-entry: compare the forms of Deeds of Defeazance, given by lessees for reviving conditions of re-entry lost under the rule in *Dumpor's Ca.*, in Davidson's Conveyancing, 2nd ed., vol. v. pt. ii. p. 1032; Bythewood and Jarman, 3rd ed., vol. iii. pp. 685, 687-95; also *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

Extension of definitions of "lease," "under-lease," and "under-lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this Act "under-lessee" shall include any person deriving title under or from an under-lessee.

"Lease," "under-lease."

This s., in giving the extended meaning to the words "lease," "under-lease," carries out the view of the law set out in *Swain* v. *Ayres*; *Lowther* v. *Heaver*; and *Strong* v. *Stringer*, cited in the note on C. A., s. 14 (1).

Trustees.

Trustee may be appointed for separate parts of property though no new trustee be appointed of other parts.

6. *A separate set of trustees or a separate trustee may be appointed under the fifth section of the Conveyancing Act,* 1882, *of a part only of the trust property, notwithstanding that no new trustees or trustee are to be appointed of other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; and every appointment already made of a separate set of trustees shall be valid notwithstanding that there was no retiring trustee of other parts of the trust property, and that no new trustees were appointed of such other parts thereof.*

This s. is repealed by the T. A., and s. 10 of that Act takes its place.

CHAPTER VII.

LAND TRANSFER ACT, 1897, PART I., AND SS. 11, 24-6. 60 & 61 VICT. c. 65.

An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875. [6th August, 1897.]

A.D. 1897.

WHEREAS it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875, in this Act, referred to as "the principal Act:"

38 & 39 Vict. c. 87.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent of Act.

The Act extends only to England, Wales, and Berwick-on-Tweed: see L. T. A., s. 2; L. T. A., 1897, s. 26; 20 Geo. 2, c. 42, s. 3.

"Real representative."

The expression "real representative" does not occur in any section of the Act.

"Preamble."

As to the effect of the preamble in this Act, *cf. Overseers of West Ham* v. *Iles*, 8 A. C. 386, 389; *Bruce* v. *Marquis of Ailesbury*, 1892, A. C. 356, 361.

PART I.

Establishment of a Real Representative.

S. 1.

Devolution of legal interest in real estate on death.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2.) This section shall apply to any real estate over

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Establishment of a Real Representative.

which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate" in this part of this Act shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5.) This section applies only in cases of death after the commencement of this Act.

Compare C. A., s. 30, *sup.* The legal estate remains in the heir until administration is taken out: *John* v. *J.*, 1898, 2 Ch. 573.

See generally on this Act, Cherry and Marigold's Land Transfer Acts.

"Real estate."

There is no positive definition of "real estate." The expression is (subs. 3) contrasted with personal estate, and should, it seems, be taken as meaning property (other than copyholds, subs. 4) which is not personal estate, and which was, before 1898 (s. 25), capable of being disposed of by the will, if any, of the deceased.

"Vested."

"Vested" in subs. 1 can hardly be taken in its technical sense (*i.e.* as the opposite of contingent), but probably implies no more than mere ownership.

Beneficial interests.

The s., notwithstanding the marginal note, includes beneficial interests: see *Phillips* v. *Probyn*, 1899, 1 Ch. 811; *Re Harrowby and Paine*, W. N., 1902, 137.

Equitable estate in copyholds.

The words "in any case . . . tenant" in subs. 4 apply to "land of copyhold tenure" as well as "customary freehold." Hence an equitable estate in copyholds has been held to pass to the personal representatives: *Re Somerville & Turner*, 1903, 2 Ch. 583.

Trust and mortgage estates.

Trust and mortgage estates are not included, and devolve under C. A., s. 30, as they cannot be disposed of by will.

Tenant for life.

On the death of a tenant for life of registered land, the fee simple does not pass to his personal representatives: L. T. A., 1897, s. 6 (4), (8); L. T. R., 1903, r. 187; and the same must hold in the case of unregistered land.

Tenant in tail.

Also on the death of a tenant in tail the land will pass under the entail.

Probate to universal devisee or legatee.

The practice of the Probate Division to grant administration with the will annexed, and not probate according to the tenor, to the universal devisee and legatee, where no executor is named, is not altered by this Act: *In b. Pryse*, 1904, P. 301.

Establishment of a Real Representative.

The title of an administrator relates back to the time of death, as to real as well as personal estate: S. C.

Title of administrator relates back.

Though a testator may appoint special executors of a fund, and general executors of the rest of his personalty (*Rose* v. *Bartlett*, Cro. Car. 292; see, however, *Owen* v. *O.*, 1 Atk. 495), the s. seems to vest the real estate, either in all the executors, special and general if appointed (see *Flanders* v. *Clarke*, 3 Atk. 509), or perhaps only in the general executors; see *Re Parker*, 1894, 1 Ch. 707, 722, and n. to s. 2 (2), *inf.* One result is that there cannot be a real representative apart from the personal representative, see subs. 3, *suprà*, and s. 2 (3), *infrà*.

No power to appoint separate real representative.

The Crown is not bound by this s.: *In b. Hartley*, 1899, P. 40; and see *In b. Ball*, W. N., 1902, 226.

Crown not bound.

As to the appointment of a judicial trustee in the place of an executor, see Judicial Trustees Act, 1896, s. 1 (1) (2), and *Re Ratcliff*, 1898, 2 Ch. 352.

Removal of executor.

2.—(1.) Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

Provisions as to administration.

It was no doubt intended to make the real representative a trustee only after the estate had been administered, but in terms the subs. goes further; and see *Re Timmis*, 1902, 1 Ch. 176; (*cf. Re Cowley*, 1901, 1 Ch. 38).

Real representatives made trustees.

As to the power of persons beneficially entitled to personal estate to require the transfer thereof by the personal representative, see *Cooper* v. *Cooper*, L. R. 7 H. L. 53, 64–7, 71–2; *Re Jones*, 1897, 2 Ch. 190, 202; *Re Dickson*, W. N. 1890, p. 10.

"Power of requiring transfer of personal estate."

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him,

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Establishment of a Real Representative.

save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

Conveyance of real estate.

All the executors named in a will, who have not renounced probate, must concur in a conveyance of the testator's real estate, whether they have proved or not: *Re Pawley & London and Provincial Bank*, 1900, 1 Ch. 58. This is subject to the exception that, where by his will a testator appoints special executors as to property situated abroad, the concurrence of the special executors is not necessary: *Re Cohen's Exors. and L. C. C.*, 1902, 1 Ch., 187.

Redemption and foreclosure.

The administrator of a mortgagor may bring a redemption action, or be sued in a foreclosure action, without the heir being made a party: *Re Harrowby & Paine*, W. N., 1902, 137.

Practice.

"Without the authority of the Court:" r. 299 of the L. T. R., 1903, does not apply to applications under Part I. of the Act: *Re Walbeck*, W. N., 1904, 204.

(3.) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

Retainer.

The proviso at the end of this subs. prevents the personal representative from acquiring any right of retainer or priority as against real assets: *Re Williams*, 1904, 1 Ch. 52.

Widow's right to dower.

This subs. makes the widow's right to dower subject to the claims of her deceased husband's creditors, whether they had obtained a charge on his lands in his lifetime or not. Whether this was so before the Act or not, see Wms. R. P., 19th ed., 318, note.

Costs of administration action.

The rule laid down by *Patching* v. *Barnett*, 51 L. J. (Ch.) 74, and *Re Middleton*, 19 Ch. D. 552, that the costs of an administration action must be borne by the real estate, so far only as they have been increased by the administration of the real estate, is not altered by this Act: *Re Jones*, 1902, 1 Ch. 92.

Costs of construction summons.

On a summons by executors to determine a question between the heir and a devisee, the unsuccessful devisee was ordered to pay the costs of the heir, the rule as to costs in a summons dealing with personalty not being applied: *Re Peel*, W. N., 1899, 208.

Establishment of a Real Representative.

Estate duty.

The Finance Act, 1894, s. 9 (1), made estate duty a charge on all property not passing to the executor as such. Though by virtue of the L. T. A., 1897, real estate now devolves on the personal representatives, s. 9 (1) of the Finance Act, 1894, must be construed with reference to the law as it stood at that time; hence real estate still remains charged: *Re Palmer*, W. N., 1900, 9; and the estate duty thereon is not a "testamentary expense": *Re Sharman*, 1901, 2 Ch. 280.

(4.) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Grants to heir-at-law.

For cases of grants to the heir-at-law, see *In b. Ardern*, 1898, P. 147; *In b. Barnett*, *ib.* 145 (no notice given to next-of-kin); and see *In b. Roberts*, *ib.* 149, where a grant *ad colligendum* only was made until the heir-at-law could be cited.

Costs of Probate action.

Semble—The Probate Division can now order the costs of a Probate action to be paid out of real estate: see *Re Prince*, 1898, 2 Ch. 225.

Rule made pursuant to subs. 4.

The following Rule, dated 20th November, 1897, has been made pursuant to subs. 4:—

"All rules, orders, and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897. The number of this Rule for the Principal Registry is 109; and for District Registries, 103."

Provision for transfer to heir or devisee.

3.—(1.) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities

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Establishment of a Real Representative.

of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

"Subject to a charge."

It is conceived that if the assent or conveyance is made subject to a charge in general terms, the devisee or heir can sell free from the charge (and see 44 Sol. J. 191). But, if the usual statutory notices have been given to creditors, and all the debts of the deceased of which the personal representatives have had notice have been paid, no charge should be inserted in the assent or conveyance; as, even if inserted, it would not extend to debts (if any) of which the personal representatives had no notice at the date of the assent or conveyance: *Re Cary & Lott*, 1901, 2 Ch. 463.

(2.) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fits, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorize the registrar to register the person named in the assent as proprietor of the land.

This s. speaks of "land" (see definition, s. 24 (1) *inf.*); the two preceding ss. speak of "real estate."

Assent by executors.

It would seem that the assent of the legal personal representative can vest the legal title in leaseholds or freeholds, part of a residuary gift, in the residuary legatee or devisee: see *Austin* v. *Beddoe*, 41 W. R. 619; and *Elliott* v. *Elliott*, 9 M. & W. 23, 25, 27.

For purposes of title it is advisable in every case to have an assent in writing, which, if not under seal, is not liable to stamp duty as a conveyance or transfer under s. 62 of the Stamp Act, 1891: *Kemp* v.

Commrs. of Inl. Rev., 1905, 1 K. B. 581. A conveyance cannot be insisted on: *Re Pix*, W. N., 1901, 165.

All the representatives must join in the assent or conveyance: s. 2 (2) *sup.*, and note thereto.

A devisee cannot require an assent to describe the land devised in more precise terms than those in the will: *Re Pix, sup.*

As to the prescribed form of assent, see L. T. R., 1903, r. 185, Form 51; also L. T. A., 1897, s. 6 (5).

SS. 3, 4.

Establishment of a Real Representative.

Appropriation of land in satisfaction of legacy or share in estate.

4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court.

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land.

SS. 4, 5, 11, 24.

Establishment of a Real Representative.

Subs. (1) applies to personal estate as well as real estate; but it does not, where there is a trust for sale and conversion, take away the former power of appropriation: *Re Beverly*, 1901, 1 Ch. 681.

Rules of Court under this s. remain to be made; for an instrument of appropriation, see L. T. R., 1903, r. 185, Form 52.

Trust for sale. Notice part of the title.

The notice to be given under subs. 1 becomes, it seems, part of the title to the appropriated land.

Liability for duty.

5. Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

See *Re Palmer*, and *Re Sharman*, cited in note to s. 2 (3), *sup.*

Part II.

As to statute of 32 Hen. 8, c. 9.

11. Section two of the statute of the thirty-second year of the reign of Henry the Eighth, chapter nine, which prohibits sales and other dispositions of land of which the grantor or his predecessor in title has not been in possession for one whole year previously to the disposition being made, is hereby repealed.

As to the meaning of the repealed s., see *Jenkins* v. *Jones*, 9 Q. B. D. 128, 134.

Interpretation.

24.—(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

(2.) In this Act the expression "personal representative" means an executor or administrator.

"Land."

The statutory definition of "land" did not apply to the L. T. A.: see s. 4 of that Act; the definition in this s. would include a personal inheritance and chattels real.

SS. 25, 26.

Establishment of a Real Representative.

Commencement of Act.

Short title and construction.

25. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

26. This Act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts, 1875 and 1897.

PART II.

REGISTRATION AND SEARCHES.

CHAPTER I.

THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

51 & 52 VICT. c. 51.

An Act for registering certain Charges on Land, and for facilitating Searches for them. [24th December, 1888.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2.

INTRODUCTORY.

PART I.—INTRODUCTORY.

Short title.

1. This Act may be cited as the Land Charges Registration and Searches Act, 1888.

Commencement.

2. This Act shall come into operation on the first day of January, one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that any rules under this Act may be made, and any other thing for the purpose of bringing this Act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this Act.

Extent.

3. This Act shall not extend to Scotland or Ireland.

S. 4.

INTRODUCTORY.

Interpretation.

4. In this Act:

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this Act.

"Act of Parliament" includes local and personal Act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

24 & 25 Vict. c. 133.
46 & 47 Vict. c. 61.

"Land charge" also includes charges under s. 31 of the Agricultural Holdings Act, 1883 (see Tenants Compensation Act, 1890, s. 3), and under s. 3 of the Agricultural Holdings Act, 1900.

But not charges created "in invitum," *e.g.* under s. 257 of the Public Health Act, 1875: see proviso to s. 10, *inf.*, and *Reg.* v. *Land Registry*, 24 Q. B. D. 178. Compare L. T. R., 1903, r. 1 (3).

Semble, the charge created by s. 9 (6) of the Finance Act, 1894, in favour of a limited owner, who pays estate duty, is not a "land charge" within the above definition, as it is not created in consequence of an application: (see proviso to s. 10 *inf.*, and *Reg.* v. *Land Registry*, *sup.*). The certificate granted on an application under s. 9

SS. 4, 5.

INTRODUCTORY.

(2) of the Finance Act, 1894, does not create the charge, but is only evidence of the amount charged: (see subs. 3 of that s.). Compare s. 33 of the Finance Act, 1896.

50 & 51 Vict. c. 57.

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

The Deeds of Arrangement Act, 1887, does not apply to arrangements made by limited companies: *Re Rileys, Ltd.*, 1903, 2 Ch. 590.

"Judgment" does not include an order made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

PART II.—REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

The Bankruptcy Court still evades the duty of keeping a proper record of bankruptcies and receiving orders so as to facilitate a search, which at present is the most onerous of all searches, and cannot be made with any certainty as to a correct result.

Writs and orders.

Writs or orders not in bankruptcy require to be re-registered under this Act every five years: s. 5 (3).

The Crown not being mentioned, its process of execution was not affected by the Act: but see now The Land Charges Act, 1900, ss. 2, 3, *inf.*

Registration under this Act supersedes registration in the Supreme Court: s. 5 (4).

The search will be in the names of the vendor or mortgagor and their predecessor in title, dead or living.

Lis pendens.

Search for *lis pendens* must still be made to the same extent as if this Act had not passed: s. 6 (*b*).

Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

Receiver.

"Any Court," "any order": these words seem to cover an order of a County Court appointing a receiver under s. 2 (3) of the Tithe Act, 1891; but *qu.* as to an order under s. 2 (2): see definition of "judgment" in s. 4, *sup.*

(2.) Every entry made in pursuance of this section

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

Power to vacate the registration of a writ or order affecting land (formerly wanting : see *Cook* v. *Cook*, 15 P. D. 116) has been given by S. L. A. 1890, s. 19, *inf.*, Part V., Ch. VI.

Protection of purchasers against non-registered writs and orders.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land, unless the writ or order is for the time being registered in pursuance of this Act.

The application of this s. is extended by s. 3 of the Land Charges Act, 1900, *inf.*

Provided that—

(a) *Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled "An Act to amend the law relating to future judgments, statutes, and recognizances," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;*

"The expiry of the period for which it is registered": apparently the registration of a writ or order under The Judgments Act, 1864, which was only required for the purpose of obtaining an order for sale under s. 4 (*Re Pope*, 17 Q. B. D. 743), only continued in force for the

SS. 6, 7, 8, 9.

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

three months from the time of registration mentioned in s. 1 of the Law of Property Amendment Act, 1860. This proviso is repealed by s. 5 of the Land Charges Act, 1900, *inf.*

(*b*) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

"For the time being": as to Court's power to vacate a *lis pendens*, see 30 & 31 Vict. c. 47, s. 2; *Baxter* v. *Middleton*, 1898, 1 Ch. 313; affirmed, 42 Sol. J. 508; *Reilly* v. *Richardson*, 43 Sol. J. 457; *King* v. *Barber*, 47 Sol. J. 110. As to entry of satisfaction of a *lis pendens*, see 22 & 23 Vict. c. 115, s. 2.

REGISTRATION OF DEEDS OF ARRANGEMENT.

PART III.—REGISTRATION OF DEEDS OF ARRANGEMENT.

Deeds of arrangement.

All deeds of arrangement, whether executed before or after the commencement of the Act, must be registered (s. 9), but one year was allowed for registration of deeds executed before 1889 (s. 9).

The search will be in the names of the vendor or mortgagor, and their predecessors in title.

There is no provision for re-registration.

Register of deeds of arrangement affecting land.

7. A register (in this Act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

Registration of deeds of arrangement.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Protection of purchasers against unregistered deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a person who, after the commencement of this Act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed

is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this Act until the expiration of one year from the commencement of this Act if registered within that year.

SS. 9, 10.

REGISTRATION OF DEEDS OF ARRANGEMENT.

It is conceived that the words "and until" do not give to registration an *ex post facto* operation. See *Hargrave* v. *H.* 23 Beav. 484.

PART IV.—REGISTRATION OF LAND CHARGES.

REGISTRATION OF LAND CHARGES.

Only land charges created after 1888 are absolutely required to be registered under this Act.

Land charges after 1888.

As to land charges before 1889 the same searches must be made as formerly. The provision in s. 13 for registration on an assignment made after 1888, gives assistance, but cannot be relied on, as there may be no such assignment.

Before 1889.

The search (s. 10) must be in the name of the person entitled whether legally or equitably to the freehold in possession or the tenant on the Court Rolls when the charge was created; so that it cannot be confined to the name of the immediate vendor or mortgagor, but must be carried back against all owners in possession for the time being.

Against whom.

There is no provision for re-registration.

10. A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

Registry of land charges.

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

SS. 10, 11, 12, 13, 14, 15.

REGISTRATION OF LAND CHARGES.

See *e.g.* The Improvement of Land Act, 1864, ss. 8, 11, 66 and 67. On a sale or mortgage of leaseholds, the same searches should be made for land charges as in the case of freeholds.

Leaseholds.

Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this Act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Protection of purchasers against unregistered charges.

12. A land charge created after the commencement of this Act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this Act.

"And until": see n. to s. 9.

Non-registered landcharge existing at commencement of this Act.

13. After the expiration of one year from the first assignment by act inter vivos, occurring after the commencement of this Act, of a land charge created before the commencement of this Act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this Act prior to the completion of the purchase.

The words "and until" are omitted in this s.

Vacation of entry.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

SUPPLEMENTAL.

PART V.—SUPPLEMENTAL.

Index to registers.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this Act.

See Rule 3 in Ch. II. *inf.*

SS. 16, 17, 18.

SUPPLEMENTAL.

16. Any person may search in any register or index kept in pursuance of this Act on paying the prescribed fee.

Searches.

Official searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this Act [in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges], in the same manner as if this Act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881.

45 & 46 Vict. c. 39.

44 & 45 Vict. c. 41.

The "register of *lis pendens*" appears to be a mistake for the "register of writs and orders;" but the words in square brackets seem altogether superfluous.

S. 2 (1) of the C. A., 1882, provides that a requisition should refer to that s. But neither Forms 5 and 7 in the Schedule to the Rules of 1st January, 1889 (Ch. II., *inf.*), nor the Forms now in use under this Act and the Land Charges Act, 1900, contain any reference to that s.

General rules.

18. The Lord Chancellor may at any time after the passing of this Act, and from time to time, with the concurrence of the Commissioners of Her Majesty's Treasury as to fees, make such general rules as may be required for carrying this Act into effect.

CHAPTER II.

RULES UNDER THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888 (1st JANUARY, 1889).

Rule 1.—The several Registers established by the Act shall contain the following particulars respectively, or such other particulars as the Registrar shall from time to time determine:—

(1.) The Register of Writs and Orders shall contain:—

(*a*) The name, address, and description of the person whose land is affected.

(*b*) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made.

(*c*) The date of registration, and of any renewal of registration.

(*d*) The name and address of the applicant or of the solicitor (if any) making the application.

(2.) The Register of Deeds of Arrangement shall contain:—

(*a*) The name, address, and description of the person whose land is affected.

(*b*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.

(*c*) The date of registration.

(*d*) The name and address of the applicant or of the solicitor (if any) making the application.

(3.) The Register of Land Charges shall contain:—

(*a*) The name, address, and description, and capacity (that is to say, whether (i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the Court Rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made.

(*b*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated.

(*c*) The date of registration.

(*d*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the Registers themselves, all entries in such registers being made alphabetically in the manner now used in the Register of Judgments in the Central Office of the High Court of Justice, or in such other manner as the Registrar shall from time to time determine.

Rule 4.—Applications for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the Schedule hereto, or in such other forms as the Registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the Office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the Register, such evidence in respect thereof as the Registrar shall from time to time think necessary shall be required.

Rule 8.—These Rules may be cited as the Land Charges Rules, 1889.

THE SCHEDULE—FORMS.

FORM 1.—*Application to Register a Writ or Order.*

FORM 2.—*Application to Register a Deed of Arrangement.*

FORM 3.—*Application to Register a Land Charge.*

FORM 4.—*Declaration in support of an Application to Register.*

FORM 5.—*Application for an Official Search.*

[*The Form now in use under this Act, and the Land Charges Act,* 1900, *provides for the following searches:—Registers of Writs and Orders and Lis Pendens for the period of five years ending the of* 19 , *inclusive; Annuities and Rentcharges from the* 26*th of April,* 1855, *to the of* 19 , *inclusive; Deeds of Arrangement from the* 1*st of January,* 1889, *to the of* 19 , *inclusive; Land Charges from the* 1*st of January,* 1889, *to the of* 19 , *inclusive. As to the time over which the last three searches should extend, see* Ch. IV., *inf.*]

FORM 6.—*Declaration by separate Instrument as to purposes of Search.*

FORM 7.—*Certificate of Official Search.*

FORM 8.—*Requisition for Continuation of Official Search.*

FORM 9.—*Certificate of Continuation of Official Search* (*to be endorsed on the original Certificate*).

[*The Forms are not set out here, as they are sold at the Office of Land Registry. See Rule* 5.]

The following further Forms have also come into use at the Office of Land Registry since the Land Charges Act, 1900.

Application to Register an Annuity or Rentcharge.

Application to Register a Lis Pendens.

Application to Re-Register a Lis Pendens Writ or Order.

Acknowledgment of Satisfaction of a Lis Pendens, Annuity or Rentcharge pursuant to 23 & 24 Vict. c. 115.

Certificate of Satisfaction pursuant to the last-mentioned Act.

CHAPTER III.

THE LAND CHARGES ACT, 1900.
63 & 64 VICT. c. 26.

An Act to amend the Law relating to Charges on Land and to matters connected therewith. [30th July, 1900.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

S. 1.

Transfer to Land Registry Office of business relating to the registry of judgments.

1.—(1.) The business of the registrar of judgments hitherto conducted in the central office of the Supreme Court shall be conducted in the Office of Land Registry, and the Lord Chancellor may by order provide for transferring to the Office of Land Registry such officers as may be required for conducting that business, and such books and papers as may be needed in connexion therewith, and for carrying out any arrangements incidental to or consequential on the transfer, and for abolishing the office of registrar of judgments.

(2.) Provided that nothing in this section shall apply to the registry of Scotch and Irish judgments established under the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882, or any Act amending the same.

31 & 32 Vict. c. 54.
45 & 46 Vict. c. 31.

(3.) This section shall come into operation on such day as the Lord Chancellor at any time after the passing of this Act may by order direct.

By Order dated 3rd August, 1900, it was provided that this s. should come into operation on the 1st September, 1900, and that on

Order transferring business.

SS. 1, 2, 3.

that date there should be transferred to the Office of Land Registry: (1.) All registers and applications for registration relating to English Judgments, *Lis Pendens*, Crown Debts, Executions, and Annuities; (2.) All Day Books and Account Books; (3.) All Certificates of Official Searches; and (4.) All Præcipes for ordinary Searches from the 1st January, 1900.

Closing of register of judgments.

2.—(1.) A judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888.

51 & 52 Vict. c. 51.

"Any interest in land": for a judgment to operate as a charge, it is no longer necessary that the land should be actually delivered in execution. It seems, therefore, that a judgment creditor would now, on registering a writ of elegit, or an order appointing a receiver, obtain a charge on an estate in remainder, which is incapable of being taken in execution: see *Re South*, 9 Ch. 369; *Re Harrison & Bottomley*, 1899, 1 Ch. 465.

Estates in remainder.

(2.) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

Priorities.

The priorities of charges on land under this s. will, it is conceived, be determined by the dates on which the writs or orders are registered.

1 & 2 Vict. c. 110.
2 & 3 Vict. c. 11.
23 & 24 Vict. c. 38.
27 & 28 Vict. c. 112.
28 & 29 Vict. c. 104.

(3.) Except under an order of the High Court, no entry shall be made in any register kept under sections nineteen and twenty-one of the Judgments Act, 1838, section eight of the Judgments Act, 1839, the Law of Property Amendment Act, 1860, the Judgments Act, 1864, or the Crown Suits, &c. Act, 1865.

Amendments of 51 & 52 Vict. c. 51.

3. Section six of the Land Charges Registration and Searches Act, 1888, shall apply to every writ and order

affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this Act, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto.

SS. 3, 4, 5.

4. From and after the passing of this Act the Middlesex Registry Act, 1708, shall not apply to any instrument made after the passing of this Act and capable of registration under this Act or the Land Charges Registration and Searches Act, 1888.

7 Anne, c. 20, not to apply to certain charges.

The Land Registry (Middlesex Deeds) Act, 1891, s. 6, provided that it should not be necessary for the validity of any judgment, statute, or recognisance, that a memorial thereof be registered under the Middlesex Registry Act, 1708.

5. As from the commencement of this Act the enactments specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Repeal.

The repeal of s. 3 of the Law of Property Amendment Act, 1860, appears to have the result of restoring to an unregistered judgment against a deceased debtor its former priority over simple contract debts in administration. See *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189. But it is conceived that, in the administration *by the Court* of the insolvent estate of a person dying on or after the 1st November, 1875, judgment debts, whether registered or unregistered, have no priority: Judicature Act, 1875, s. 10; *Re Whitaker*, 1901, 1 Ch. 9 (disapproving *Re Maggi*, 20 Ch. D. 545); *M'Causland* v. *O'Callaghan*, 1904, 1 Ir. R. 376.

Priority of registered judgments in administration.

It is conceived that notwithstanding the repeal in s. 4 of the Judgments Act, 1864, of the words, "and whose writ . . . registered," a judgment creditor cannot obtain an order for sale under that s. until he has registered a writ or order under s. 5 of the Land Charges Registration and Searches Act, 1888, and so obtained a charge under s. 2 of this Act. See the words in s. 5 of the Judgments Act, 1864, "any other debt . . . is a charge on such land," and "the charge of the petitioner."

Sale under Judgments Act, 1864, s. 4.

The words "while the registry of such writ or process shall continue in force" were apparently left in s. 4 of the last-mentioned Act by inadvertence.

S. 6.

Extent, commencement, short title, and construction.

6.—(1.) This Act shall not extend to Scotland or Ireland.

(2.) This Act shall, except as otherwise expressly provided, come into operation on the first day of July one thousand nine hundred and one.

(3.) This Act may be cited as the Land Charges Act, 1900, and shall be construed as one with the Land Charges Registration and Searches Act, 1888.

51 & 52 Vict. c. 51.

SCHEDULE.

ENACTMENTS REPEALED. Section 5.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
1 & 2 Vict. c. 110.	The Judgments Act, 1838.	Section nineteen, and section twenty-one, from the words "Provided always" to "one shilling."
2 & 3 Vict. c. 11.	The Judgments Act, 1839.	Sections two, three, five, six, eight, and nine, and section four, except so far as it applies to lis pendens.
3 & 4 Vict. c. 82.	The Judgments Act, 1840.	Section two.
18 & 19 Vict. c. 15.	The Judgments Act, 1855.	Section two, from "But no judgment" to the end of the section; section three, except so far as it relates to lis pendens; and sections four to eight.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Sections one to five.
27 & 28 Vict. c. 112.	The Judgments Act, 1864.	Sections one, two, and three, and, in section four, the words "and whose writ or other process of execution shall be duly registered."
28 & 29 Vict. c. 104.	The Crown Suits, &c., Act, 1865.	Sections forty-eight and forty-nine.
51 & 52 Vict. c. 51.	The Land Charges Registration and Searches Act, 1888.	Proviso (*a*) of section six.

CHAPTER IV.

SEARCHES GENERALLY.

Practical directions as to searches.

FOR full information as to searches the reader is referred to Dart, 7th ed., 1191–1227, and Elphinstone and Clark on Searches (including Appendix containing the Land Charges Registration and Searches Act, 1888). But the following short statement as to the most usual searches may be useful in practice. The Land Charges Registration and Searches Act, 1888, is referred to as the Act of 1888, and the Land Charges Act, 1900, as the Act of 1900.

Judgments, and writs of execution on judgments.

Judgments entered up after 1 & 2 Vict. c. 110, and on or before 23rd July, 1860, did not affect land as to a purchaser or mortgagee unless registered under 1 & 2 Vict. c. 110, and re-registered under 2 & 3 Vict. c. 11, within five years before the execution of the conveyance or mortgage.

As to judgments entered up between 23rd July, 1860, and 30th July, 1864, it seems that under 23 & 24 Vict. c. 38, s. 1, they could affect no land, as to a purchaser or mortgagee, without the issue of a writ or other due process of execution. Such writ or other process, if issued before 1st January, 1889, required registration under the last-mentioned Act, but the writ or process lost its force, if not executed within three months of its registration (s. 1). If issued after 31st December, 1888, it came under the Act of 1888, ss. 5, 6, and was void against a purchaser for value, within the meaning of that Act, unless registered thereunder.

Judgments entered up between 29th July, 1864, and 1st July, 1901, did not bind land until it was actually delivered in execution (27 & 28 Vict. c. 112, s. 1). And writs or orders (other than in bankruptcy) affecting land, issued or made on such judgments after 31st December, 1888, required to be registered at the Land Registry under the Act of 1888. As to writs or orders registered under the Act of 1864, on the 1st January, 1889, see s. 6 (*a*) of the Act of 1888.

An estate in remainder cannot be delivered in execution: *Hood*

Barrs v. *Cathcart*, 1895, 2 Ch. 411; *Re Harrison & Bottomley*, 1899, 1 Ch. 465.

Appointment of receiver.

The appointment of a receiver is equivalent to an actual delivery in execution, within the meaning of 27 & 28 Vict. c. 112, of the equitable estate in land of a judgment debtor: *Hatton* v. *Haywood*, L. R. 9 Ch. Ap. 229; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Ex p. Evans*, 13 *ib.* 252.

Crown debts and writs of execution on Crown debts.

Crown debts from 4th June, 1839, up to and including 1st November, 1865, did not affect land as to a purchaser or mortgagee unless registered under 2 & 3 Vict. c. 11, s. 8, and re-registered under 22 & 23 Vict. c. 35, s. 22, within five years before the execution of the conveyance or mortgage.

After the 1st November, 1865, no Crown debt affected land, as to a purchaser or mortgagee, unless a writ of execution was registered under 28 & 29 Vict. c. 104, ss. 48 and 49, before the execution of the conveyance or mortgage and payment of the purchase or mortgage money. No re-registration was required.

Registration under the Act of 1900.

Now by ss. 2 and 3 of the Act of 1900 no judgment, as defined by the Act of 1888, whatever its date, and whether obtained on behalf of the Crown or otherwise, and no Crown debt, whatever its date, operates as a charge on land unless a writ or order for the purpose of enforcing it is registered under s. 5 of the Act of 1888; and all writs and orders, whenever obtained, for the purpose of enforcing any such judgments or Crown debts are void as against a purchaser or mortgagee, unless registered and re-registered under the Act of 1888.

The consequence is that the only search now necessary in respect of judgments (other than in bankruptcy) and Crown debts is for writs and orders for the period of five years prior to the time of search.

Lis pendens.

A *lis pendens* (which does not affect chattels or choses in action: *Wigram* v. *Buckley*, 1894, 3 Ch. 483) must be re-registered every five years (2 & 3 Vict. c. 11, s. 7), and the search should extend over that period.

Annuities or rent-charges.

The search for old enrolled grants of life annuities can now rarely, if ever, be necessary.

The search for entries of grants of life annuities or rent-charges on or after 26th April, 1855, registered under 18 & 19 Vict. c. 15, s. 12, should be from the commencement of the register on that day if the person against whom search is made had then become entitled to the property and attained twenty-one before that day, but otherwise from the time when he became entitled, whether in possession or in reversion, to the property, or the day when he attained twenty-one, whichever last happened.

Disentailing deeds.

In case of entailed property a search for enrolled deeds of disentail from the time when the tenant in tail attained twenty-one may be advisable. He may have given a security while his estate was reversionary, thereby creating a base fee, and the deeds might be in his possession without any default on the part of the creditor.

Insolvencies.

The search for insolvencies can rarely now be necessary.

Bankruptcies.

The search for bankruptcies must still be made by the purchaser's solicitor in the registers at the Bankruptcy Court until means are afforded for an official search. The search should in strictness extend back for twelve years, but a five years' search is commonly deemed sufficient: Dart, 7th ed., 1224–5. Even twelve years seem not sufficient in cases where a vendor has acquired freehold land within that time, as the purchaser would obtain no title against the bankruptcy trustee (see *Re New Land Development Association & Gray*, 1892, 2 Ch. 138), and there would be no bar by adverse possession of the vendor. The position of a vendor or mortgagor is, however, generally so well known as to render a bankruptcy search unnecessary.

An order of adjudication in bankruptcy is not a "conveyance" requiring registration in Middlesex: *Re Calcott & Elvin*, 1898, 2 Ch. 460. For effect of an act of bankruptcy before completion of contract, see *Powell* v. *Marshall, Parkes & Co.*, 1899, 1 Q. B. 710.

Dealings by bankrupt with subsequently acquired property.

Where the bankrupt has acquired personal property after his bankruptcy, and his trustee has not intervened, transactions by the bankrupt with any person dealing with him in good faith and for value, in respect of such property, whether with or without knowledge of the bankruptcy, are valid against the trustee: *Cohen* v. *Mitchell*, 25 Q. B. D. 262; *Hunt* v. *Fripp*, 1898, 1 Ch. 675. This principle applies to leaseholds: *Re Clayton & Barclay*, 1895, 2 Ch. 212; hence on a sale of leaseholds the search against the vendor for bankruptcies need not be carried back beyond the date when he acquired the property; but it does not apply to real estate: *Re New Land Development Association & Gray*, 1892, 2 Ch. 138; and see *Bird* v. *Philpott*, 1900, 1 Ch. 822; *London &c. Contracts, Ltd.* v. *Tallack*, 51 W. R. 408; W. N., 1903, 8; and see further as to the limits of the principle, *Re Clark*, 1894, 2 Q. B. 393.

As to orders made by a Court in bankruptcy affecting a person other than the bankrupt, see Williams, V. & P. Vol. I., 517.

Search for writs, &c., under Acts of 1888 and 1900.

Searches for writs, orders, and *lis pendens* for five years, and also for deeds of arrangement and land charges created or assigned after 1888, and life annuities or rent-charges must be made at the office of Land Registry in the registers kept there pursuant to the Acts of 1888 and 1900. The time over which the search for deeds of arrangement and land charges should extend must be determined in the same way as above mentioned with respect to the time for a search in the rent-charge register, except that, as to land charges, search during a minority may be necessary.

Land charges prior to 1889.

As to searches for land charges created before 1889, and not registered under s. 13 of the Act of 1888, see Williams, V. & P. Vol. I. 519–521.

Extent of search.

The practice is to make the above searches only since the last preceding sale or mortgage, and not to search against preceding owners, it being assumed that former purchasers or mortgagees made proper searches and found nothing adverse; but the same practice is not

generally observed in the case of searches in the Yorkshire, Middlesex, and Irish Deeds Registries: see, however, Elphinstone and Clark on Searches, p. 144.

The searches should be made in the names of all persons, living or dead, who were owners since the last purchase or mortgage.

Trustees and mortgagees.

The only search necessary against trustees, or mortgagees, is for *lis pendens* for five years: except that where title is made through a mortgagee selling under a power of sale, there should be a search against him for bankruptcies: see Bankruptcy Act, 1883, s. 44 (ii.). As to searches against mortgagees who have been paid off: see 18 & 19 Vict. c. 15, s. 11; Dart, 7th ed., 1221.

Certificates of searches to be abstracted.

Where the vendor or mortgagor has in his possession certificates of official searches they ought now to be shown on the abstract.

Certificate conclusive.

In *Proctor* v. *Cooper*, 2 Drew. 1, a purchaser making a search for judgments was held to have notice of an incumbrance which he failed to discover. The official certificate is now conclusive on all matters within s. 2 of the C. A., 1882, and the solicitor should rely on that, and not search himself; he must, however, see that the requisition delivered under subs. 1 is properly framed.

Enrolled deeds.

Subs. 11 of the last-mentioned s. excludes from the operation of that s. all enrolled deeds, the object being to make the official certificate binding only on those who make use of the office register for recording their incumbrances, and not to affect the validity of any actual conveyance upon which the title to land depends, as in case of a disentailing assurance. But a search for deeds enrolled, though so excluded, can be asked for (see R. S. C., December, 1882, Form III., Part I., Ch. V., *sup.*), and a certificate of search obtained. It will, however, only extend to deeds at the Enrolment Department of the Central Office: after two years enrolments of deeds and recognizances should be—but it is believed are not always—removed to the Record Office (R. S. C., O. 61, r. 13), and search must be made there by the solicitor himself. It is conceived that a solicitor will be justified in relying on an official certificate for enrolled deeds so obtained, so far as it extends, though this s. does not expressly exonerate him. The Court could scarcely make him answerable for an omission by its own officer.

Office copy and certificate of enrolment.

If the certificate of search discloses an enrolled deed material to the title, an office copy of the enrolment may be obtained under the 5th of the Rules made under s. 2 of C. A., 1882 (Part I., Ch. V., *sup.*). An office copy is made evidence of the enrolment by 12 & 13 Vict. c. 109, s. 19. By s. 18 of that Act a certificate of enrolment is authorized to be endorsed on every enrolled deed certifying the day of enrolment, and when sealed or stamped with the seal of the Enrolment Department (see now Supreme Court of Judicature (Officers) Act, 1879, ss. 4, 5, 12 (1); R. S. C., O. 61, rr. 6, 7), is evidence that the deed was enrolled on the day mentioned in the certificate.

Deeds Registry searches.

Search in a Deeds Registry should be against each successive owner from the date of the deed under which he acquired his interest to the date of *the registration* of the deed by which he parted with his

interest, both dates inclusive. Whether the search should extend over the whole period of the abstract is a question to be considered in each case. Search against a testator or intestate must be continued after his death against him as well as his personal representative and his devisee or heir up to the date of registration of the conveyance by the personal representative devisee or heir. Where the will has to be registered within a given time and is not so registered it may be advisable also to search against the heir before taking a title from the executor or devisee. Where a mortgagee sells under his power of sale it is not necessary to search against the mortgagor after the date of registration of the mortgage. As to searches against persons having power to appoint new trustees, see T. A., s. 12 (4).

See also, as to searches in the Middlesex and Yorkshire Registries, the Land Registry (Middlesex Deeds) Rules, 1892, and the Yorkshire Registries Acts, 1884 and 1885. Official certificates of search can be obtained, and a solicitor, trustee, &c., is not answerable for any loss arising from error therein, but the same are not conclusive in favour of a purchaser.

Palatine Courts searches.

In the case of land in Durham or Lancashire, search should be made for *lis pendens* for five years in the local registry as well as in the office of Land Registry (18 & 19 Vict. c. 15, s. 3).

Copyholds.

In the case of copyholds the Court Rolls should be searched.

Pending applications for registration.

In some cases it may be advisable to inspect the Index Maps, and list of pending applications kept under rr. 12 & 13 of the L. T. R. 1903; and see rr. 283, 293.

Registered dispositions

As to searches in the Land Registry in the case of land registered under the L. T. A.'s, see L. T. R., 1903, rr. 283–295.

Companies

On a sale or mortgage by a company registered under the Companies Acts, the Register of Mortgages and Charges kept by the Company under s. 43 of the Companies Act, 1862, and the Register of Mortgages and Charges kept under s. 14 of the Companies Act, 1900, should be inspected: Dart, 7th ed. 1222–3.

London Gazette.

In some cases it may be advisable to search in the *London Gazette* for advertisements of winding-up resolutions and petitions; (Companies Act, 1862, s. 132; and Companies (Winding-up) Rules, r. 27).

Sewering &c. charges.

In the case of land in or near a town, it will generally be advisable to inquire of the local authority as to sewering, paving, and other like charges.

PART III.

TRUSTEE ACTS.

CHAPTER I.

THE TRUSTEE ACT, 1888.
51 & 52 VICT. c. 59.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.]

The whole of this Act—except ss. 1 and 8—was repealed by T. A. (see s. 51 and Schedule); and see, for re-enactments similar to the parts of this Act which are repealed, ss. 5 (1) (*a*), 8, 9, 14, 17, 18, 19, and 45 of the T. A. Repeal and re-enactment.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Short title, extent, and definition.

1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

Constructive or express trustee. Executor-trustee.

As to the distinction between an express and a constructive trustee, see *Soar* v. *Ashwell*, 1893, 2 Q. B. 390; *Re Gallard*, 1897, 2 Q. B. 8; *North American &c. Co., Ltd.* v. *Watkins*, 1904, 1 Ch. 242; 2 Ch. 233. As to when a person appointed to be executor and trustee of a will ceases to hold the assets as executor, and becomes a trustee thereof, see *Re Timmis*, 1902, 1 Ch. 176.

Director of Company.

A director of a company can, in proceedings taken against him on the footing of breach of trust, claim the benefit of s. 8, as being, within the definition of this subs., "a trustee whose trust arises by construction or implication of law"; see *Re Lands Allotment Co.*, 1894, 1 Ch. 616; *Whitwam* v. *Watkin*, 78 L. T. 188; *Re National Bank of Wales*, 1899, 2 Ch. 629, affirmed *sub. nom. Dovey* v. *Cory*, 1901, A. C. 477.

The Act does not apply to a trustee in bankruptcy, or other officer of a Court accountable to the Court: *Re Cornish*, 1896, 1 Q. B. 99.

A first mortgagee who has sold, is trustee of the surplus proceeds: see *Thorne* v. *Heard*, 1894, 1 Ch. 599, 607; 1895, A. C. 495.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

As to the effect of this subs. on the exception in s. 8 (1), see *Moore* v. *Knight*, 1891, 1 Ch. 547, 553.

Statute of limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run

against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

"Trustee."

"A trustee": see s. 1 (3), (4), and notes thereon.

"Claiming through him."

"Claiming through him"; *i.e.*, the executors, administrators and assigns of the trustee: *Leahy* v. *De Moleyns*, 1896, 1 Ir. R. 213, 242.

"Party or privy."

"Fraud or fraudulent breach of trust *to which the trustee was party or privy*": these words indicate moral complicity. A man cannot be a party or privy to that in which he has taken no part and of which he knows nothing, and which has in fact been committed by another for his own benefit; the fraud of the trustee's agent, for his own purposes, is not enough to bring the trustee within this exception: see *Thorne* v. *Heard*, 1894, 1 Ch. 599; 1895, A. C. 495; and see *Collings* v. *Wade*, 1896, 1 Ir. R. 340.

"Or other proceeding against a trustee."

It is difficult to see why subs. 1 should not cover the case where the beneficiary happens to have been made defendant, though the claim is in effect against the trustee, but see *Re Chapman*, 1896, 1 Ch. 323, 326; reversed 1896, 2 Ch. 763.

An action will lie against the executors of a husband who forcibly deprived his wife of a legacy given for her separate use: *Wassell* v. *Leggatt*, 1896, 1 Ch. 554, 558.

"Still retained."

"Still": *i.e.* at the date of the issue of the writ. He retains the trust property or the proceeds thereof, if he, or any agent for him, has it so that he can get it; but not if it has been lost, whether by negligence or otherwise: *Thorne* v. *Heard*, *sup.*; *Collings* v. *Wade*, *sup.*

"Received and converted to his use."

It was held, in *Re Gurney*, 1893, 1 Ch. 590, in an action against trustees for breach of trust in lending trust funds on the security of property of insufficient value, that the application of part of the loan in paying off an existing charge in favour of a banking firm in which

one of the trustees was a partner, did not bring him within this exception; and a trustee is not within this exception who only receives the share to which he is beneficially entitled: *Re Timmis*, 1902, 1 Ch. 176.

And see, on the necessity of alleging and proving the existence of one of the exceptions, *Re Page*, 1893, 1 Ch. 304.

"Conferred by any statute."

As to the application of subs. 1 (*a*), see *Re Bowden*, 45 Ch. D. 444, 448, 450–1; *Mara* v. *Browne*, 1895, 2 Ch. 69, 95; *Robinson* v. *Harkin*, 1896, 2 Ch. 415; *How* v. *Earl Winterton*, 1896, 2 Ch. 626.

Where a trustee, who has executed a deed containing a covenant, or what amounts to a covenant on his part, commits a breach of trust, he is a specialty debtor; (see Carson's R. P. Statutes, p. 405) and the statute would be the 3 & 4 Will. IV., c. 42, s. 3.

"No existing statute of limitations."

Where an action is brought against a person appointed executor and trustee of a will, who has ceased to hold the assets as executor, and has become a trustee thereof, s. 8 of the Real Property Limitation Act, 1874, does not apply, and the action is barred after six years by this subs.: *Re Swain*, 1891, 3 Ch. 233; *Re Timmis*, *sup.*

"Lapse of time."

Time runs from the date of the breach of trust, not of its discovery, except in a case of concealed fraud by an agent, for which the trustee is liable as principal: see *Thorne* v. *Heard*, *sup.*; *Moore* v. *Knight*, 1891, 1 Ch. 547; and where the breach of trust was an investment on insufficient security, time runs from the date of investment, not from its turning out bad: *Re Somerset*, 1894, 1 Ch. 231.

Contribution between trustees.

In cases of contribution for breaches of trust between co-trustees, time does not begin to run until the beneficiary has got judgment: *Robinson* v. *Harkin*, *sup.* As to the time from which an annuitant is entitled to an account, see *How* v. *Earl Winterton*, *sup.*; and for form of order, see *Re Davies*, 1898, 2 Ch. 142.

Annuitant.

The period is the six years which may be pleaded under 21 Jac. 1 c. 16; and see *Re Somerset*, *sup.*; *Barnes* v. *Glenton*, 1899, 1 Q. B. 885; *Mara* v. *Browne*, *sup.*; *How* v. *Earl Winterton*, *sup.*

Interests in remainder.

"But shall not begin to run:" for a case of the same beneficiary, taking distinct successive interests, see *Mara* v. *Browne*, *sup.*

Tenant for life barred.

Where the tenant for life is barred, but not the remaindermen, trustees will be entitled to retain for their own use during the life of the tenant for life the income of a fund paid by them to make good a breach of trust: *Re Somerset*; and *Collings* v. *Wade*, *sup.*

Subs. 2 and 3 do not apply as against persons served with a decree after 1st January, 1889, for general administration, in an action commenced before that date: *Re Harrison*, W. N., 1892, 148.

Right or defence of executor or administrator.

As to the rights or defences to which executors or administrators are entitled under existing statutes of limitation, see 3 & 4 Will. 4, c. 27, s. 40; 23 & 24 Vict. c. 38, s. 13; 37 & 38 Vict. c. 57, s. 8; *Re Johnson*, 29 Ch. D. 964; *Martin* v. *Earl Beauchamp*, W. N., 1888, 247; *Sutton* v. *S.*, 22 Ch. D. 511, 517; *Re Davis*, 1891, 3 Ch. 119; *Re Lacy*, 1899, 2 Ch. 149.

As to an executor setting up his own "devastavit," and claiming

the benefit of the statute, see *Re Hyatt*, 38 Ch. D. 609; *Re Marsden*, 26 *ib.* 783.

For further provision for relief of trustees, see the Judicial Trustees Act, 1896, s. 3, which enacts as follows:

Judicial Trustees Act, 1896.

3.—(1.) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2.) This section shall come into operation at the passing of this Act [14th August, 1896].

Relief under this s. has been granted in *Re Kay*, 1897, 2 Ch. 518; *Re Roberts*, 76 L. T. 479; *Re Grindey*, 1898, 2 Ch. 593; *Perrins* v. *Bellamy*, 1899, 1 Ch. 797; *Re Lord de Clifford*, 1900, 2 Ch. 707; *Re Smith*, 71 L. J. Ch. 411; and see *Re Houghton*, 1904, 1 Ch. 622; but was refused in *Re Turner*, 1897, 1 Ch. 536; *Re Stuart*, 1897, 2 Ch. 583; *Wynne* v. *Tempest*, W. N., 1897, 43; *Chapman* v. *Browne*, 1902, 1 Ch. 785; *Waite* v. *Parkinson*, 85 L. T. 456; and see *Re Second East Dulwich &c. Society*, 68 L. J. Ch. 196. Trustees need not plead the Act specially: *Singlehurst* v. *Tapscott &c. Ltd.*, W. N., 1899, 133.

CHAPTER II.

THE TRUST INVESTMENT ACT, 1889.
52 & 53 VICT. c. 32.

An Act to amend the Law relating to the Investment of Trust Funds. [12th August, 1889.]

The whole of this Act—except ss. 1 and 7—was repealed—except as to Scotland—by the T. A. (see s. 51 and Schedule); and see, for re-enactments similar to the parts of this Act which are repealed, ss. 1, 2, 3, 4, and 50 of the T. A.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Trust Investment Act, 1889.

Investments of sinking fund by local authorities.

7. Where the council of any county or borough or any urban or rural sanitary authority are authorized or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorized by this Act to invest, except that such council or authority shall not by virtue of this section invest in any stocks, funds, shares, or securities issued or created by themselves, nor in real or heritable securities.

Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.

As to the effect of this s. on the question whether a corporation was a trustee within the meaning of the Act, see *Re Manchester Royal Infirmary*, 43 Ch. D. 420, 427.

8. *The enactments specified in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned, but without prejudice to the validity of any act done under any enactment so repealed.* *Repeal of enactments in schedule.*

The repeal of this s. by the T. A. does not revive these enactments: Interpretation Act, 1889, s. 38 (2), (*a*).

SCHEDULE.

ENACTMENTS REPEALED. Section 8.

Session and Chapter.	Title.	Extent of Repeal.
4 & 5 Will. 4, c. 29.	An Act for facilitating the loan of money upon landed securities in Ireland.	The whole Act.
22 & 23 Vict. c. 35.	An Act to further amend the law of property and to relieve trustees.	Section thirty-two.
23 & 24 Vict. c. 38.	An Act to further amend the law of property.	Section eleven.
30 & 31 Vict. c. 132.	An Act to remove doubts as to the power of trustees, executors, and administrators to invest trust funds in certain securities, and to declare and amend the law relating to such investments.	The whole Act.
34 & 35 Vict. c. 47.	The Metropolitan Board of Works (Loans) Act, 1871.	Section thirteen.

CHAPTER III.

THE TRUSTEE ACT, 1893.
56 & 57 VICT. c. 53.

An Act to consolidate Enactments relating to Trustees.
[22nd September, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

S. 1.

INVESTMENTS.

Authorized investments.

PART I.—INVESTMENTS.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

"Trustee," "Trust fund."

For the meaning of the expressions "trust" and "trustee," see s. 50.

It was held that the T. A., 1889, applied to a corporation holding funds for a charitable purpose: *Re Manchester Royal Infirmary*, 43 Ch. D. 420 (a decision partly based on s. 7 of that Act, which is not re-enacted in this): but not to a building society whose funds were invested in its own name, or in the names of trustees who had no power to invest: *Re National &c. Bldg. Society*, *ib.* 431; but see now the Building Societies Act, 1894, s. 17.

The Court will not invest trust funds in securities prohibited by the settlor: *Ovey* v. *O.*, 1900, 2 Ch. 524, not following *Re Wedderburn*, 9 Ch. D. 112.

"Unless expressly forbidden."

A direction to invest in a specified investment is not an express prohibition against investing in other investments: *Re Maire*, 49 Sol. J. 383; but it would seem that a direction to trustees to *appropriate* investments of a particular class to answer a particular purpose—*e.g.* the payment of an annuity—is unaffected by the powers of s. 1, and

that the trustees cannot appropriate other investments authorized by the s., even though not expressly forbidden by the instrument creating the trust: see *Re Owthwaite*, 1891, 3 Ch. 494.

S. 1.

INVESTMENTS.

Trustees have, unquestionably, under the words of this Act, the power of selling investments not made under it, for the purpose of making investments authorized by it—a power which, after some doubt (see *Re Manchester Royal Infirmary, sup.*), it was held they had under the less precise terms of the T. A., 1889: *Hume* v. *Lopes*, 1892, A. C. 112.

"Whether at the time in a state of investment or not."

(*a*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:

(*b*) On real or heritable securities in Great Britain or Ireland:

Long terms of years do not answer the description of "real securities" within the meaning of a power to invest on real securities: *Re Boyd*, 14 Ch. D. 626; *Re Chennel*, 8 *ib.* 492; but see now s. 5 (1) (*a*), *inf.*

"Real securities."

As to whether harbour rates and tolls answer this description, see *Hutton* v. *Annan*, 1898, A. C. 289.

By s. 33 of the Finance Act, 1896, any money authorized to be invested in real security may be invested on the security of a charge under that s. of a capital sum paid for redeeming land tax.

Finance Act, 1896.

As to contributory mortgages, see *Webb* v. *Jonas*, 39 Ch. D. 660; *Re Massingberd*, 63 L. T. 296; *Stokes* v. *Prance*, 1898, 1 Ch. 212, 223–4. As to trustees' duties in calling in mortgages, see *Re Chapman*, 1896, 2 Ch. 763.

(*c*) In the stock of the Bank of England or the Bank of Ireland:

(*d*) In India three and a half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament:

Nearly all of these securities are bearer bonds.

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

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(*g*) In the debenture or rent-charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

Dividend at 3 per cent.

The power given by subs. (*o*), taken with R. S. C., O. 22, r. 17, is wider: payment of "a dividend" for ten years next before the date of investment is enough. S. 4 of the T. A., 1894, allows the retainer of an investment which has ceased to be of the authorized class.

(*h*) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (*g*), either alone or jointly with any other railway company:

(*i*) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j*) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company:

The last clause of this subs., "also . . . Company," is new.

(*k*) In the stock of any railway company in India upon which a fixed or minimum dividend in

sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

The last clause of this subs., "or upon . . . guaranteed," is new.

(*l*) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(*m*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

"Last census": see *Re Druitt*, 1903, 1 Ch. 446.

Nominal debentures and nominal debenture stock.

S 5 (3), *inf.* re-enacts s. 27 of the Local Loans Act, 1875 (repealed by this Act), so as to enable trustees to invest on nominal debentures, or nominal debenture stock issued by local authorities under that Act.

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorized by law to be levied:

"Incorporated by Act of Parliament," *i.e.* by Special Act: see *Re Smith*, 1896, 2 Ch. 590. "Last census": see *Re Druitt, sup.*

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(*o*) In any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court,

See R. S. C., O. 22, r. 17, and note to (*g*), *sup.*

and may also from time to time vary any such investment.

Colonial Stock and Metropolitan Water Stock.

The powers of this Act have been extended to certain Colonial Stocks, subject to the restrictions of s. 2 (2), *inf.*: Colonial Stock Act, 1900; and to Stock created under the Metropolis Water Act, 1902; see s. 17 (4). For a complete list of the Colonial Stocks authorised up to May 27, 1905, see W. N., 1905, 151.

Purchase at a premium of redeemable stocks.

2.—(1.) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

As to purchase of redeemable stock, though at a premium, compare *Cockburn* v. *Peel*, 3 De G. F. & J. 170, 172; *Mortimer* v. *Picton*, 4 De G. J. & S. 176, 180.

(2.) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

See also T. A., 1894, s. 4.

Discretion of trustees.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the

instrument, if any, creating the trust with respect to the investment of the trust funds.

For effect of placing the range of investment at the discretion of the trustees, see *Re Smith*, 1896, 1 Ch. 71.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Application of preceding sections.

5.—(1.) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

Enlargement of express powers of investment.

(*a*) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) On any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

27 & 28 Vict. c. 114.

This subs. replaces s. 60 of the Improvement of Land Act, 1864, repealed by this Act, as to trustees.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

This subs. replaces the Debenture Stock Act, 1871, repealed by this Act.

(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any

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nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

38 & 39 Vict. c. 83.

Railway debentures, power to invest in.

"Unless the contrary, &c." Nominal debentures and nominal debenture stock issued under the Local Loans Act, 1875, are authorized by s. 1 (*o*), subject to a proviso that they are not redeemable within fifteen years. Thus, whatever may be the true view as to the effect of this s. on s. 1 (see last n. to this s.), a trustee with an *express* power of investing in debenture stock of a railway company, although in terms narrower than those of s. 1 (*g*), has a wider power of investment in stock issued under the Local Loans Act, 1875, than a trustee, whose powers of investment are derived from this Act alone.

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

43 & 44 Vict. c. 8.

This subs. replaces s. 7 of the Isle of Man Loans Act, 1880, repealed by this Act, as to trustees.

Certain securities of colonial governments come under subs. 1 (*e*), and securities under the Isle of Man Loans Act, 1880, are authorized by s. 1 (*o*) unless redeemable within fifteen years. Thus the n. to the last subs. applied to this subs. also, until the passing of the Colonial Stock Act, 1900.

(5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

28 & 29 Vict. c. 78.

This subs. replaces s. 40 of the Mortgage Debenture Act, 1865, repealed by this Act.

In the last edition of this work (pp. 206, 211) a doubt was expressed whether s. 5 enlarges the powers given by s. 1, but, notwithstanding the marginal note, it is conceived that it has that effect. The Act is an "instrument" (s. 50), and, but for the marginal note, which is not part of the Act, it would be difficult to maintain the contrary view. See Champernowne & Johnston, Trustee Act, 1893, p. 36.

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Power to invest, notwithstanding drainage charges.

10 & 11 Vict. c. 32.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

This s. replaces s. 37 of the Public Money Drainage Act, 1846; s. 53 of the Landed Property Improvement (Ireland) Act, 1847; and s. 61 of the Improvement of Land Act, 1864, all repealed by this Act.

Trustees not to convert inscribed stock into certificates to bearer.

26 & 27 Vict. c. 73.
33 & 34 Vict. c. 71.
38 & 39 Vict. c. 83.
40 & 41 Vict. c. 59.

7.—(1.) A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(*a*) The India Stock Certificate Act, 1863;
(*b*) The National Debt Act, 1870;
(*c*) The Local Loans Act, 1875;
(*d*) The Colonial Stock Act, 1877.

(2.) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

This s. replaces s. 4 of (*a*), s. 29 of (*b*), s. 21 of (*c*), and s. 12 of (*d*), all repealed by this Act.

As to the custody of bearer securities, see *Re De Pothonier*, 1900, 2 Ch. 529.

Loans and investments by trustees not chargeable as breaches of trust.

8.—(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the

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loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able and practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

This and the following subs. replace s. 4 of the T. A., 1888.

"Can lawfully lend"—"By reason only."

The security must not be one of a class which is attended with hazard: *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; or which in other respects and independently of value, is improper: *Re Walker*, 59 L. J. Ch. 386, 391; *Re Turner*, 1897, 1 Ch. 536, 541.

"Chargeable."

"Chargeable," see *Re Chapman*, 1896, 1 Ch. 323, 330; but see S.C., 1896, 2 Ch. 763.

"Believed to be"—"Instructed and employed."

It was held in *Re Somerset*, 1894, 1 Ch. 231, 253, that the words "believed to be" do not govern the words "instructed and employed," etc. It seems the surveyor must *in fact* be so instructed and employed: see also *Re Walker*, *sup.*; but see *Re Stuart*, 1897, 2 Ch. 583, 592.

Surveyor's certificate.

To keep the trustees harmless under this subs., the certificate of the surveyor should show:

(1) That the loan does not exceed two-thirds of the property as estimated by the surveyor and stated in the report.

(2) That the surveyor advises to the effect that the loan may be made or that the security is sufficient.

Components of value.

The Act imposes no condition as to the components of value. They may include buildings, mines, timber, or valuable rights of any kind. It is only necessary that the surveyor advises the value to be sufficient. In the case of mines or timber of large value, he would probably advise some special provisions as to working or cutting.

The statement as to value and the advice must be in the report itself, and not in a subsequent letter or in a postscript to the report. And see, for cases which turned on the sufficiency of a surveyor's report, *Re Walker*; *Re Stuart*, *sup.*

Relief under Judicial Trustees Act.

Relief under s. 3 of the Judicial Trustees Act, 1896, has been refused where the requirements of this s. were not complied with: *Re Turner*; *Re Stuart*, *sup.*

As to the law apart from the Act, see *Fry* v. *Tapson*, 28 Ch. D. 268; *Smethurst* v. *Hastings*, 30 *ib.* 490; *Re Whiteley*, 32 *ib.* 196; 33 *ib.* 347; 12 App. Ca. 727; *Re Olive*, 34 Ch. D. 70; *Rae* v. *Meek*, 14 App. Ca. 558; *Re Salmon*, 42 Ch. D. 351; *Head* v. *Gould*, 1898, 2 Ch. 250,

266. In *Re Olive* and *Re Salmon*, the security consisted of small houses at weekly rents.

As to retaining authorized securities, see *Re Chapman*, 1896, 2 Ch. 763.

(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

Purchase of leaseholds.

A trustee purchasing leaseholds is saved, under V. & P. A., s. 2 (1) (taken with s. 15 of this Act), and under C. A., ss. 3 (1), 66, from inquiry into the lessor's title.

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section applies to transfers of existing securities, as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

Liability for loss by reason of improper investments.

9.—(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

See *Re Somerset*, 1894, 1 Ch. 231, 253–4; *Re Salmon*, 42 Ch. D. 351; *Re Turner*, 1897, 1 Ch. 536, 541; *Head* v. *Gould*, 1898, 2 Ch. 250.

(2.) This section applies to investments made as well before as after the commencement of this Act except

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where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

For further provision for relief of trustees, see the Judicial Trustees Act, 1896, s. 3, and cases thereunder referred to in n. to T. A., 1888, s. 8, *sup.*

VARIOUS POWERS AND DUTIES OF TRUSTEES.

PART II.—VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of appointing new trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

Executor-trustee.

This s. does not give power to appoint a new executor. The Court has no such power under this Act (see s. 25 (3)). But when the same persons are appointed executors and trustees, this s. applies as soon as their duties *quâ* executors are performed: see *Re Earl of Stamford*, 1896, 1 Ch. 288, 297; and compare *Re Timmis*, 1902, 1 Ch. 176.

Corporation trustee with individual.

As to appointing a corporation to act as trustee jointly with an individual, see Bodies Corporate (Joint Tenancy) Act, 1899; *Re Thompson*, 1905, 1 Ch. 229.

S. L. A. trustees.

See s. 47, *inf.*, as to the powers of this Act in relation to S. L. A. trustees.

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The powers of this Act for the appointment of new trustees are by s. 3 of the Trustees Appointment Act, 1890, taken with the Interpretation Act, 1889, s. 38 (1), extended to the case of land acquired and held on trust for certain religious and educational purposes. It is conceived, however, that this s. would apply, subject to statutory provisions to the contrary, to all property held on charitable trusts.

Trustees for religious, &c. purposes.

"More than twelve months:" see *Re Walker*, 1901, 1 Ch. 259. When the event happens, the beneficiaries are entitled to have a new trustee appointed: *O'Reilly* v. *Alderson*, 8 Ha. 101; *Re Earl of Stamford*, 1896, 1 Ch. 288, 296.

"Remains out of the U. K."

By paying the trust funds into Court, trustees indicate their desire to be discharged, and new trustees can be appointed by the donees of the power: *Re Bailey*, 3 W. R., 31.

"Desires to be discharged."

The s. enables a trustee to retire from part only of the trusts, and gets over the questions raised in *Savile* v. *Couper*, 36 Ch. D. 520; *Re Moss*, 37 *ib.* 513, 516, as to whether this could be done without the aid of the Court.

"All or any of the trusts."

Costs of retirement.

As to the costs of the retirement of a trustee, see Lewin, 11th ed., 816; *Re Beveridge*, 43 Sol. J. 509.

Refusal to act —Disclaimer.

This s. includes the case of disclaimer. After disclaimer, which relates back, the person disclaiming is considered as never having been a trustee, but up to the time of disclaimer the trust estate remains vested in him, otherwise there would be nothing to disclaim. The estate being vested in him on trust at the moment of disclaimer, he necessarily is then a trustee, and a trustee who refuses, and can then, —but not, of course, afterwards (see *Re Birchall*, *inf.*)—exercise the powers of this subs. The estate passes to him without any express assent, but subject to the right of dissenting: see Lewin, 11 ed., 217; *Smith* v. *Wheeler*, 1 Vent. 128; *Siggers* v. *Evans*, 5 Ell. & Bl. 367, 382; *Standing* v. *Bowring*, 31 Ch. D. 282. In *D'Adhemar* v. *Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was included in the words "trustee who shall refuse to act" under Lord Cranworth's Act, s. 27; see also Lewin, 11th ed., 798. Disclaimer of the office of trustee is also a disclaimer of the legal estate: *Re Birchall*, 40 Ch. D. 436; and see *Re Gordon*, 6 Ch. D. 531, 534.

There can be no partial disclaimer of a trust: *Re Lord & Fullerton*, 1896, 1 Ch. 228.

"Unfit to act." "Incapable of acting." Bankruptcy.

Bankruptcy is unfitness: see *Re Barker*, 1 Ch. D. 43; *Re Adams*, 12 *ib.* 634; *Re Hopkins*, 19 *ib.* 61, 63; *Re Roche*, 2 Dru. & War. 287; —though there may be exceptional cases where the Court will not exercise the powers given it by s. 25 (1), *inf.* (which replaces s. 147 of the Bankruptcy Act, 1883, repealed by this Act), to remove a bankrupt trustee: see the two first-mentioned cases: see also *Re Wheeler & De Rochow*, 1896, 1 Ch. 315, 322.

Lunacy.

A lunatic is "incapable of acting": *Re Lemann*, 22 Ch. D. 633; *Re Blake*, W. N., 1887, 173; *Re Cutler*, 39 Sol. J. 484; and a new trustee can under this s. be appointed in his place (see the latter case); and, consequently, an effectual vesting declaration can be made under

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s. 12, *inf.* And as to the appointment, in Lunacy, of a new trustee, where the donee of the power is a lunatic: see *Re Shortridge*, 1895, 1 Ch. 278. But the s. does not cover unfitness or incapacity of infancy: *Re Tallatire*, W. N., 1885, 191.

Infancy.

The result is that the person entitled to exercise the powers of appointment given by this s. can effect the removal of an absent, or bankrupt, or lunatic trustee, and, under s. 12, divest him of the trust estate so far as that s. applies.

Person "nominated for the purpose of appointing."

In settlements made since Lord Cranworth's Act, the form of the power generally is "that A. B. shall have power to appoint new trustees," without specifying in what cases. Under that form, the power being unlimited, A. B. will be the "person nominated for the purpose" within the meaning of this s.: see *Re Walker & Hughes*, 24 Ch. D. 698. But if the power expressly specifies the cases in which an appointment may be made, and includes only some of the cases mentioned in this s., then as regards the remaining cases the donee of the power is not "the person nominated for the purpose" within this s., and the appointment must be made by the surviving or continuing trustee or his personal representatives: see *Cecil* v. *Langdon*, 28 Ch. D. 1; *Re Wheeler & De Rochow*, 1896, 1 Ch. 315. This applies whether the settlement be made before or after the commencement of this Act. As to the different purposes for which the power may be given, see S. C. 321.

Alienation of interest by "person nominated."

Administration action.

A power to appoint new trustees continues, notwithstanding alienation by the donee of the power of all his interest (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417), and also notwithstanding a decree in an administration action, but then it should be exercised with the sanction of the Court: *Re Gadd*, 23 Ch. D. 134; *Thomas* v. *Williams*, 24 *ib.* 558, 567–8; *Re Hall*, 54 L. J. Ch. 527; W. N., 1885, 17. But an appointment without the Court's sanction would not be void.

"Instrument" includes Act of Parliament: s. 50, *inf.*

Person nominated unable or unwilling.

Where persons nominated jointly to appoint fail to agree, an appointment may be made under this s., on the footing of their not being "able and willing": *Re Sheppard*, W. N., 1888, 234; and for a case where no such person could be found, see *Cradock* v. *Witham*, W. N., 1895, 75.

"Continuing trustee."

A continuing trustee is one who is to continue to act after the completion of an intended appointment: *Re Coates to Parsons*, 34 Ch. D. 370. A trustee who has made up his mind to retire is not a continuing trustee (but see subs. 4, *inf.*), and need not join in an appointment by his co-trustee, unless it is shown that he is willing and competent to act under subs. 4: *Re Coates to Parsons*, *sup.* Nor is he a surviving trustee within the meaning of the power, though he is in fact the actual survivor: *Travis* v. *Illingworth*, 2 Dr. & Sm. 344.

A continuing sole trustee is not bound to appoint a new trustee: *Peacock* v. *Colling*, 33 W. R. 528, where, however, the will contemplated a sole trustee acting.

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A deceased *sole* trustee is a "last surviving or continuing trustee": *Re Shafto*, 29 Ch. D. 247.

"Last surviving or continuing trustee."

In a case where a sole surviving trustee appointed general executors and also special executors to execute the trusts, and the general executors obtained probate, and, before any grant to the special executors, appointed new trustees, the appointment was held good: *Re Parker*, 1894, 1 Ch. 707. It would appear from the judgment in this case (see p. 721), that executors cannot exercise the powers of this s. before probate is granted, and that it is not competent for a testator, by appointing special executors for the purposes of a trust estate, to make them his "personal representatives" for purposes of this s.

Personal representatives of last surviving trustee.

Exercise of powers by one of several executors.

It seems that the proving and acting personal representatives can alone exercise the power, and that the concurrence of an executor who renounces or does not act is unnecessary: *Earl Granville* v. *M'Neile*, 7 Ha. 156, but it is conceived that all proving or acting executors must join, and the usual practice is to join all.

Personal representatives of a deceased trustee are not bound to exercise the power: *Re Knight*, 26 Ch. D. 82.

"May by writing appoint."

"Writing" does not include a will: *Re Parker*, *sup.*

Donee appointing himself.

It is conceived that donees of the statutory power cannot appoint themselves: *Re Skeats*, 42 Ch. D. 522; *Re Newen*, 1894, 2 Ch. 297; but see and consider *Montefiore* v. *Guedalla*, 1903, 2 Ch. 723, where there was an express power not containing the word "other." In any case such an appointment should only be made in special circumstances, S. C.

As to the donees of the power communicating with the beneficiaries before exercising it, see *O'Reilly* v. *Alderson*, 8 Ha. 101.

Appointment by the Court.

The Court will not appoint where there is a person able and willing to do so: *Re Higginbottom*, 1892, 3 Ch. 132: but see *Re Wheeler & De Rochow*, 1896, 1 Ch. 315.

Where a private Act (passed in 1869) incorporated s. 27 of Lord Cranworth's Act, enabling the appointment of new trustees, with a qualification that every appointment should be made with the approbation of the Court, it was held, after the repeal of the latter Act, that an appointment could be made under the power conferred by C. A., s. 31, and that the qualification did not apply: *Re Lloyd*, W. N., 1888, 20.

The registrars in the Probate Registry have refused to grant letters of administration merely for the purpose of enabling the power given by this s. to be exercised where there are no assets. As to grants of administration limited to trust property, see *In b. Vereker*, 1896, 1 Ir. R. 200; *In b. Butler*, 1898, P. 9; or to a trust fund, see *In b. Ratcliffe*, 1899, P. 110.

Costs of appointment.

The costs, charges, and expenses of, and incidental to, the appointment, including those of the donee of the power, are payable out of the trust estate: *Harvey* v. *Olliver*, 57 L. T., 239, which shows the items to be included.

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VARIOUS POWERS AND DUTIES OF TRUSTEES.

(2.) On the appointment of a new trustee for the whole or any part of trust property—

Trust property : see s. 50, *inf.*

This subs. applies to appointments under powers in trust deeds, as well as under the statutory powers; see subss. 5 and 6. It enables the appointment of more new trustees than one, as singular includes plural (see last note to C. A., s. 2); but it applies only where there is a vacancy as to the whole or some part of the trust: *Re Gregson*, 34 Ch. D. 209; *Re Nesbitt*, 19 L. R. Ir. 509.

(*a*) The number of trustees may be increased; and

(*b*) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

This subs. replaces s. 5 of C. A., 1882, and s. 6 of C. A., 1892, and must be read with the words "all *or any* of the trusts," &c., in subs. 1, above. It is conceived that it settles the questions raised in *Savile* v. *Couper*, and *Re Moss* there cited, as to a trustee's power to retire from part only of the trust.

"Trusts distinct."

It is conceived that this subs. applies where two funds are *for the time being* held on distinct trusts, though they may ultimately coalesce: as was the case in *Re Hetherington*, 34 Ch. D. 211; *Re Moss*, 37 *ib.* 513; in which cases, however, the orders appointing the separate sets of trustees were made on applications under the T. A., 1850; and the Court had, by that Act, power to do so, independently of s. 5 of the C. A., 1882: see *Re Moss*, *sup.* But there seems no reason why trusts which are distinct for purposes of the T. A., 1850, should not be so for the purposes of this subs.

(*c*) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one

trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

Lunatic trustee—practice in lunacy.

Under the Lunacy Act, 1890, ss. 135, 136, the Judge in Lunacy will now, where a lunatic trustee has two or more co-trustees, vest in them the trust estate, although by so doing, the number of trustees will be diminished: *Re Leon*, 1892, 1 Ch. 348; thus altering the former practice in lunacy, as laid down in *Re Aston*, 23 Ch. D. 217.

Practice in High Court.

As to the practice of the High Court in keeping up the full number of trustees, see note on s. 25 (1), *inf.*

Appointment of less than original number valid or void.

Under Lord Cranworth's Act, the appointment of a single trustee was not invalid: *West of England Bank* v. *Murch*, 23 Ch. D. 138, 146; but where there is a contrary intention expressed in the instrument creating the trust, it would be: *Re Mercer*, 38 Sol. J. 338; *Hulme* v. *H.* 2 Myl. & K. 682; *Earl of Lonsdale* v. *Beckett*, 4 De G. & Sm. 73; and subs. 5, *inf.*

(*d*) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

This subs. must be read in connexion with s. 12 (1), *inf.*, rendering a conveyance of the trust property unnecessary, except in cases within subs. 3 of that s.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Compare s. 37, and see *Re Smith*, 1904, 1 Ch. 139, 144. As to liability of outgoing trustee for defaults of new trustee, see *Head* v. *Gould*, 1898, 2 Ch. 250. And see on this subs. *Mara* v. *Browne*, 1896, 1 Ch. 199, 213.

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

SS. 10, 11.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Trustee dying before testator.

The first clause of this subs. does not enable the personal representatives of a person nominated trustee, but dying before the testator, to appoint under subs. 1; the deceased person was never a surviving or continuing trustee: *Nicholson* v. *Field*, 1893, 2 Ch. 511.

On the second clause, see subs. 1, above, note "Continuing Trustee," and *Re Coates to Parsons*, there cited; also *Re Cutler*, 39 Sol. J. 484.

Retiring trustee willing to act.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"Contrary intention."

Where under an instrument, whether dated before this Act or subsequently, a limited power to appoint new trustees is given to a specified person, say, in case only of trustees refusing, the power given to the surviving or continuing trustee by subs. 1 applies to all the other cases there mentioned, and the omission to provide for all those cases is not sufficient to show a contrary intention within this subs.: *Re Wheeler & De Rochow*, 1896, 1 Ch. 315; and see *Cecil* v. *Langdon*, 28 Ch. D. 1: *Re Coates to Parsons*, 34 *ib.* 370; *Re Lloyd*, W. N., 1888, 20; *Cradock* v. *Witham*, W. N., 1895, 75.

For cases of contrary intention as to number of trustees, see the three cases cited at the end of notes to subs. (*c*), *sup.*

(6.) This section applies to trusts created either before or after the commencement of this Act.

S. 10 of this Act replaces C. A., s. 31; C. A., 1882, s. 5; and C. A., 1892, s. 6.

Retirement of trustee.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Under this subs. the continuing trustees alone will have the powers of the original trustees. The due discharge of one of several trustees leaves the others whole and sole trustees as in case of a disclaimer: *Cafe* v. *Bent*, 5 Ha. 37. If the power be merely personal, unconnected with property—for instance, to consent to a marriage—it is

not a case of trusteeship within s. 10 and this s. It might have been disclaimed under C. A., 1882, s. 6; but cannot, it would seem, be released under C. A., s. 52: see *Re Eyre Weller* v. *Ker*, there cited.

This subs. does not contain the words "all *or any* of the trusts or powers," &c., which occur in s. 10 (1); and it is conceived that a trustee cannot, under it, be discharged from part of "the trust."

No discharge from part of trusts.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

This subs. must be read in connexion with s. 12 (2), *inf.*

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"Contrary intention."

For "contrary intention" as to number, see the cases cited in the note to s. 10 (2) (*c*), *sup.*

(4.) This section applies to trusts created either before or after the commencement of this Act.

This s. replaces s. 32 of the C. A. It gives a "quasi-legislative" sanction to the Court discharging a trustee without appointing a new trustee: *Re Chetwynd*, 1902, 1 Ch. 692, 694.

Vesting of trust property in new or continuing trustees.

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting declaration on all appointments.

This s. applies to all deeds executed after the commencement of the C. A. by which a new trustee is appointed to perform "any trust," and is not confined to cases where the powers of that Act or this Act

S. 12.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

are exercised. As singular includes the plural, it also applies where more new trustees than one are appointed. The vesting declaration may therefore now be used on an appointment of a trustee in the ordinary mode under a power in a settlement, and whether the settlement be dated before or after the commencement of the C. A. It must be by deed, and not by writing merely, though the mere appointment of a trustee under either Act may be by writing only; and it must be contained in the deed appointing or discharging the trustee.

Must be by and in same deed.

Stamp duties.

Thus, as under the old practice, a deed will always be necessary where there is property to transfer, and will be chargeable with stamp duty on the appointment and also on the vesting declaration: *Hadgett* v. *Commrs. of Inl. Rev.*, 3 Ex. D. 46. In the case of a chose in action notice of assignment should be given.

Chose in action.

No declaration for equities.

The aid of this s. is required only for the purpose of vesting a legal interest. The mere appointment of a new trustee or several new trustees in itself operates to vest all equitable interests in the persons who are the trustees (*Dodson* v. *Powell*, 18 L. J. Ch. 237), and the object of this s. is to extend that principle, so far as is not inconvenient, to legal estates and rights. It may, however, be convenient to have the proper declaration in all cases.

Effect of vesting clause.

The words "who by virtue of the deed become and are *the* trustees *for performing the trust*" include the old trustees, if any, as well as the new.

Where there should be separate deed.

Cases occur, as where lands are purchased with settled money, in which it may be convenient to have a separate appointment or conveyance. The declaration which effects the vesting of the other property subject to the settlement will then omit the property separately conveyed.

Mortgages.

As to the use to be made of this subs. in mortgages of leaseholds by sub-demise, or of land by mere deposit of title-deeds, so as to enable the original term, or the legal estate, to be got in by the mortgagee, see *London and County Bk.* v. *Goddard*, 1897, 1 Ch. 642. Subs. 3 does not prevent it.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to

the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

Reasons for exemptions.

The objects of subs. 3 are to save the rights of the lord as regards customary land (which does not, it is conceived, include gavelkind land), to prevent the trusts of the money appearing on the title of land mortgaged, and to reserve to companies and other bodies the right to require transfers of their stock to be made in the statutory form.

Surrenderee not admitted.

The right of a surrenderee of copyholds before admittance is a legal interest (Jarm. on Wills, vol. i. pp. 57, 58, 5th ed.; *Wainewright* v. *Elwell*, 1 Mad. 627; and *Phillips* v. *P.*, 1 Myl. & K. 664, there cited), which is not within this s.

Vesting order made.

As to property to which the vesting declaration does not apply, and of which a transfer cannot be obtained, a vesting order will be made: *Re Harrison*, W. N., 1883, 31; *Re Keeley*, 53 L. T. 487.

Trust property outstanding.

The vesting declaration applies only to an estate subject to the trust vested in a person who was or is trustee. A transfer of an estate outstanding in any one else must be obtained in the ordinary way. Thus, suppose an equity of redemption to be conveyed on trust for sale, and the mortgage debt to be afterwards paid off, the mortgagee becomes a trustee of the legal estate, but not a trustee under the deed of trust for sale. On an appointment of new trustees of the deed the vesting declaration would not operate to get in the legal estate vested in the mortgagee.

As to registered land, see L. T. R., 1903, rr. 151, 174.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

Registry searches.

This subs. makes it necessary to search in Deeds Registries against any person having power to appoint new trustees as well as against the trustees.

(5.) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

This s. replaces C. A., s. 34.

S. 13.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13.—(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

This s. operates to supply the common form provisions of a trust for sale or a power of sale.

Any part.

As to the force of the words "any part of the property," see the last note to C. A., s. 19 (1.) (i.), and cases there cited. As to the sale of the surface apart from the minerals or *vice versâ*, see T. A., s. 44, *inf.*

Terms of sale.

The sale must be for a money consideration; see *Payne* v. *The Cork Co., Ltd.*, 1900, 1 Ch. 308, 314; but, it is conceived that a sale may be made for the shares or securities of a Company, if the trustees have power to invest in such shares or securities. If they have not the Court will only sanction such a sale in cases of emergency: *Re New*, 1901, 2 Ch. 534; *Re Tollemache*, 1903, 1 Ch. 457, 955.

Sale by way of underlease.

And trustees, who propose to sell in lots leaseholds held under one lease, cannot adopt the expedient of granting underleases to the several purchasers: *Re Walker & Oakshott*, 1901, 2 Ch. 383.

"Subject to any such conditions:" as to the extent of the trustee's discretion, compare *Hawksley* v. *Outram*, 1892, 3 Ch. 359.

As to sale of trust property along with other property.

As to the duty of trustees where trust property is sold along with other property not subject to the trust, see *Rede* v. *Oakes*, 4 D. J. & S. 505; *Re Cooper & Allen*, 4 Ch. D. 802; *Re Parker & Beech*, W. N., 1887, 27. The trustees must exercise their powers in a reasonable manner: *Dunn* v. *Flood*, 25 Ch. D. 629; 28 *ib.* 586, 591; but as to depreciatory conditions of sale, see s. 14.

Words required in trust for or power of sale.

A sufficient trust for sale may now be created by using the words "upon trust to sell the said premises," and a sufficient power of sale by using the words "with power to sell the said premises," without more, and the survivors can sell (see s. 22); but it is advisable to specify precisely who are to execute the trust or power.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained

(3.) This section applies only to a trust or power created by an instrument coming into operation after the thirty-first of December one thousand eight hundred and eighty-one.

SS. 13, 14, 15, 16.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

This s. replaces C. A., s. 35.

Power to sell subject to depreciatory conditions.

14.—(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section applies only to sales made after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

This s. replaces T. A. 1888, s. 3. Before that Act a beneficiary could prevent completion on the ground that the conditions were unnecessarily depreciatory: *Dance* v. *Goldingham*, 8 Ch. 902; and a purchaser could refuse to complete on the same ground: *Dunn* v. *Flood*, cited on s. 13, *sup.*

Power to sell under 37 & 38 Vict. c. 78.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874.

This s. replaces V. & P. A., s. 3. For a like indemnity to a trustee adopting the C. A., see C. A., s. 66.

Married woman as bare trustee may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a feme sole.

SS. 16, 17.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

As to a mortgage held on trust.

Reconveyance.

Transfer.

Payment by purchaser.

Sale.

Leaseholds.

See note to V. & P. A., s. 6, which this s. replaces.

When a married woman holds a mortgage security on trust, she is not a trustee of the land, but only of the money secured. Under s. 20, and notwithstanding the case of *Re Harkness & Allsopp*, 1896, 2 Ch. 358, she can, with the other trustees (if any), and without her husband (see M. W. P. A., s. 24), give a good receipt for the mortgage money. On payment by the mortgagor (as to which a recital in a reconveyance would seem sufficient), she becomes a bare trustee, and can reconvey without the deed being acknowledged by her: *Re Howgate & Osborn*, 1902, 1 Ch. 451.

The same would seem to apply equally to a transfer, as to which see *Re West & Hardy*, 1904, 1 Ch. 145. Either she is a bare trustee for the transferee, or she is not a trustee at all, in which case *Re Brooke & Fremlin*, 1898, 1 Ch. 647 would apply. There is no other possible *cestui que trust*. *Re West & Hardy* was decided on the ground that the purchaser had no notice of a trust, but it is submitted that the decision cannot be supported on this ground, as, if the view above suggested is incorrect, the married woman's conveyance would be wholly inoperative, whether the purchaser had notice of the trust or not.

If the married woman is paid off by a purchaser from the mortgagor, it is conceived that the principle of *Re Howgate & Osborn*, *sup.*, applies; but if she sells under her power of sale, it seems that she does so as trustee, and can only convey with the concurrence of her husband, and by deed acknowledged.

The s. does not apply to leaseholds vested in a married woman as trustee, in the case of which the husband must assign, but the deed does not require to be acknowledged.

Various Powers and Liabilities.

Power to authorize receipt of money by banker or solicitor.

44 & 45 Vict. c. 41.

17.—(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

S. 17.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

An attorney of a trustee, under a *general* power of attorney, cannot authorize a receipt under this (or, it would seem, the following) subs. (*Re Hetling & Merton*, 1893, 3 Ch. 269); though with express power he could: S. C., p. 280.

"A trustee." Indorsed receipt.

Though this subs. uses the expression "deed *containing* any such receipt as referred to in" C. A., s. 56, it is conceived that it applies where the receipt is indorsed as well as where it is in the body of the deed. The indorsement is part of the deed, and moreover an indorsed receipt is expressly referred to in s. 56.

Solicitor also a trustee.

Where the solicitor is himself one of the trustees it is conceived that this subs. does not enable payment to be made to him as solicitor for himself and co-trustees. Such payment would be a payment to one of several trustees and not a good payment.

Payment on release.

And it is conceived that payment to a solicitor producing a deed of release executed by trustees would not be a sufficient discharge for the money or property in respect of which the release is given: see note to C. A., s. 56.

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

Policies.

There is nothing as to a policy of assurance in C. A., s. 56; it would seem, therefore, that payment is more safely made to a trustee's solicitor producing a policy, than to an ordinary person's solicitor: *Viney* v. *Chaplin*; *Ex parte Swinbanks*, cited on C. A., s. 56.

As to payment into court, see Life Assurance Companies (Payment into Court) Act, 1896; R. S. C., O. 54*c*; Supreme Court Funds Rules, 1894, r. 41*a*.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

See on this subs. *Wyman* v. *Paterson*, 1900, A. C., 271, 280, 281.

SS. 17, 18.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

(4.) This section applies only where the money or valuable consideration or property is received after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

(5.) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A., 1888, s. 2, with the addition, for its special purposes, of the general saving in s. 12 (2) of that Act. The special re-enactment in this s., of s. 12 (1) of that Act (which makes the Act apply generally as well to trusts created by instrument executed before, as to trusts created after, its passing), is unnecessary, owing to the express terms of subs. 4: compare C. A., s. 56 (2).

Power to insure building.

18.—(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A., 1888, s. 7, with the addition, for its special purposes, of the general enactment in s. 12 of that Act.

As to the law apart from the Act, see *Re Fowler*, 16 Ch. D. 723; *Fry* v. *Fry*, 27 Beav. 147; Lewin, 11th ed., 702. And as to a trustee's right to indemnity out of the trust property for money expended in its preservation, see *Re Leslie*, 23 Ch. D. 552; *Falcke* v.

Scottish Imperial Insurance Co., 34 *ib.* 234; *Re Earl of Winchilsea*, 39 *ib.* 168.

SS. 18, 19.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

The s. was not meant to alter the incidence of the payments as between tenant for life and remainderman: *Re Baring*, 1893, 1 Ch. 61, for the principles as to which, see *Re Courtier*, 34 Ch. D. 136; *Re Redding*, 1897, 1 Ch. 876; *Kingham* v. *K.* 1897, 1 Ir. R. 170; *Re Betty*, 1899, 1 Ch. 821; *Re Gjers*, 1899, 2 Ch. 54; *Re Copland's Settlement*, 1900, 1 Ch. 326; *Re Waldron & Bogue*, 1904, 1 Ir. R. 249.

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19.—(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before

SS. 19, 20.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A. 1888, ss. 10, 11, with the addition, for its special purposes, of s. 12 of that Act. The s. is not intended to alter liabilities as between tenant for life and remainderman: *Re Baring*, 1893, 1 Ch. 61. The costs of carrying out the powers of the s. are distributable between those persons in proportion to their enjoyment of the estate: see that case; Lewin, 11th ed., 435, *et seq.*, and an article in the L. Q. R., 1899, p. 378.

Power of trustee to give receipts.

20.—(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Receipt clause extended.

This s. replaces C. A., s. 36. It and that s. are more comprehensive than s. 29 of Lord Cranworth's Act, which was confined to money payable under trusts or powers created after the passing of that Act (s. 34). The power to give receipts conferred by 22 & 23 Vict. c. 35, s. 23, had a similar limited operation: see Lewin, 11th ed., 528, 529.

Application of this s.

Where trustees for sale, having no express power to give receipts, had sold to a railway company, the power given by this Act was held to apply, and the purchase-money, which had been paid into Court, was ordered to be paid to them without serving the *cestuis que trust*: *Re Thomas*, W. N., 1882, 7; but the Court may refuse: *Re Smith*, 40 Ch. D. 386.

If the persons beneficially entitled in writing direct the trustees to sell, they are trustees for sale, and this s. applies: *Re British Land Co. & Allen*, 44 Sol. J. 593.

Effect of statutory receipt clause.

All trustees having now a complete statutory power to give a discharge for the funds of which they are trustees, it not only is not necessary to inquire as to a receipt clause, but it is also not material to inquire whether the funds have become vested absolutely in any beneficial owner, which would put an end to the operation of the receipt clause operating by contract only. In every case payment or

transfer to duly appointed trustees operates as a good discharge whatever may be the position of the beneficial ownership. Though this s. is especially made retrospective so as to include trusts created before 1894, yet it only applies to receipts under such trusts after 1893. C. A., s. 36, covers receipts given between 1881 and 1894: see the Interpretation Act, 1889, s. 38 (2) (*b*).

Not retrospective as to receipts.

The receipt should be expressed to be given by the trustee as such: *Miller* v. *Douglas*, 56 L. J. Ch. 91.

Power for executors and trustees to compound, &c.

21.—(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4.) This section applies to executorships, administratorships and trusts constituted or created either before or after the commencement of this Act.

This s. replaces C. A., s. 37, but extends to an administrator, who was not within that s.: *Re Clay & Tetley*, 16 Ch. D. 3.

It is conceived that where there are two or more trustees they must all act together under this s., except in trusts of a public character,

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or where there is a special authority for the majority to bind the minority: see Lewin, 11th ed., p. 284; *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121, 125–6. But an executor can in a proper case compromise a claim by his co-executor against the estate: *Re Houghton*, 1904, 1 Ch. 622.

"Compromise:" see *West of England Bank* v. *Murch*, 23 Ch. D. 138; *Sneath* v. *Valley Gold, Ltd.*, 1893, 1 Ch. 477; *Mercantile Investment Co.* v. *International Co. of Mexico, ib.*, p. 484, n.; *The same* v. *River Plate Trust &c. Co.*, 1894, 1 Ch. 578; *Re Trenchard*, 1902, 1 Ch. 378; *Graham* v. *M'Cashin*, 1901, 1 Ir. R. 404, 411.

Powers of two or more trustees.

22.—(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the thirty-first day of December one thousand eight hundred and eighty-one.

This s. replaces C. A., s. 38 (which expressly mentions executors and executorships, as well as trustees and trusts: but see T. A. s. 50, *inf.*, for meaning of "trust" and "trustee" in this Act); and compare the Act 21 Hen. 8, c. 4.

As to survivor of executors selling.

This s. removes any difficulty as to whether one surviving executor can sell under a devise to executors to sell (see Sug. Powers, 8th ed., 126 *et seq.*); but it does not affect the rule that a bare power to two or more by name will not survive: Sug. Powers, 8th ed., 128. But a power given to trustees, which enables them to deal with, or affects the trust property, is *primâ facie* annexed to the office, though requiring the exercise of a wide personal discretion, and then this s. and s. 10 (3) or s. 37 apply: *Re Smith*, 1904, 1 Ch. 139.

Executor renouncing.

As to an executor who renounces probate, see 20 & 21 Vict. c. 77, s. 79, and *Crawford* v. *Forshaw*, 1891, 2 Ch. 261.

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect

the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

This s. replaces s. 26 of Lord St. Leonard's Act (22 & 23 Vict. c. 35): compare C. A., s. 47.

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

This s. replaces s. 31 of Lord St. Leonard's Act (22 & 23 Vict. c. 35): see Lewin, 11th ed., 289–303; and *Re Brier*, 26 Ch. D. 238 (with Lord Selborne's remarks, at p. 243, as to the effect of the enactment).

Agents.

As to the employment of agents, see *Speight* v. *Gaunt*, 9 A. C., 1.

Default.

"Own . . . neglects or defaults:" see *Robinson* v. *Harbin*, 1896, 2 Ch. 415 (money deposited, for future investment, with an outside broker); *Wynne* v. *Tempest*, W. N., 1897, 43 (trust money left by trustee in the hands of his co-trustee); *Re Second East Dulwich &c. Bldg. Society*, 68 L. J. Ch. 196 (neglect by trustee enabling breach by co-trustee); *Wyman v. Paterson*, 1900, A. C. 271 (trust money left, pending investment, with a solicitor).

Indemnity.

"Reimbursement:" each trustee has a separate right to be indemnified, which is not affected by a co-trustee being in default to the estate, unless the first trustee is responsible for the other's default: *Re Frith*, 1902, 1 Ch. 342, 346.

Expenses.

Expenses properly incurred for the benefit of the whole estate are payable out of capital; see *Re Bennett*, 1896, 1 Ch. 778. As to payment of statute-barred items in a bill of costs, see *Budgett* v. *B.*, 1895, 1 Ch. 202.

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A voluntary school rate was allowed in trustees' accounts in *How* v. *Winterton*, W. N., 1902, 230.

Costs.

As to the costs of the appointment of new trustees, and the retirement of a trustee, see notes to s. 10.

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PART III.—POWERS OF THE COURT.

Appointment of New Trustees and Vesting Orders.

Power of the Court to appoint new trustees.

25.—(1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

This subs. replaces T. A., 1850, s. 32; T. A., 1852, ss. 8, 9; s. 332 of the Irish Bankrupt and Insolvent Act, 1857; and s. 147 of the Bankruptcy Act, 1883 (English).

As a general rule, the Court will not make an order under this s. where there is a person able and willing to appoint out of Court: *Re Higginbottom*, 1892, 3 Ch. 132.

No existing trustee.

See *Re Smirthwaite*, 11 Eq. 251; *Re Dixon*, 12 *ib.* 214; *Re Gillett*, 25 W. R. 23; *Re Moore*, 21 Ch. D. 778.

Bankrupt or felon trustee.

See, as to the principle on which the discretionary power of the Court to remove a bankrupt or felon trustee will be exercised, *Re Adams*, 12 Ch. D. 634; *Re Barker*, 1 *ib.* 43; *Re Betts*, 41 Sol. J. 209; *Re Dawson*, W. N., 1899, 134.

For case where trustee was physically infirm, see *Re Weston*, W. N., 1898, 151; 43 Sol. J. 29; and where the trustee was a lunatic not so found, see *Re M.*, 1899, 1 Ch. 79.

As to the principles which guide the Court in the choice of a trustee, see *Re Tempest*, L. R. 1 Ch. 485; *Re Earl of Stamford*, 1896, 1 Ch. 288; and see Lewin, 11th ed., 823.

Unmarried woman.

An unmarried woman may be appointed: *Re Dickinson*, W. N., 1902, 104; also a corporation: *Re Thompson*, 1905, 1 Ch. 229.

Corporation.

As to appointment of trustees out of the jurisdiction, see *Re Freeman*, 37 Ch. D. 148; *Re Simpson*, 1897, 1 Ch. 256.

Diminution in number.

As to the practice of the Court in keeping up the full original number of the trustees, see *Re Gardiner*, 33 Ch. D. 590; *Re Fowler*,

W. N., 1886, 183; *Re Price*, W. N., 1894, 169; *Oddy* v. *Hardcastle*, 39 Sol. J. 134; and compare *Re Leon*, 1892, 1 Ch. 348; *Re Lees*, 1896, 2 Ch. 508. The Court can in an administration action, but not under this s., discharge a trustee without appointing a new trustee in his place: *Re Chetwynd*, 1902, 1 Ch. 692.

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The Court can appoint separate sets of trustees: *Re Paine*, 28 Ch. D. 725; *Re Hetherington*, 34 *ib.* 211; *Re Moss*, 37 *ib.* 513.

Separate trustees.

As to applications to the Court under this Act, see R. S. C., O. 54 *b*; O. 55, r. 13 *a*.

Practice.

As to dispensing with service on beneficiaries on an application for appointment of new trustees, see Practice Note, W. N., 1901, 85.

For forms of orders under this s., see Seton, 6th ed., 1210 *et seq.*

(2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

This subs. replaces T. A., 1850, s. 36.

(3.) Nothing in this section shall give power to appoint an executor or administrator.

See now, Judicial Trustees Act, 1896, s. 1 (1) (2); and *Re Ratcliff*, 1898, 2 Ch. 352.

Subs. (3) is new. As to whether the Court had power under the T. A., 1850, to appoint a new executor, or a trustee in place of an executor-trustee, whose duties as executor were still unperformed, see *Re Moore*, 21 Ch. D. 778; *Re Willey*, W. N., 1890, 1; *Eaton* v. *Daines*, W. N., 1894, 32.

26. In any of the following cases, namely:—

Vesting orders as to land.

(i.) Where the High Court appoints or has appointed a new trustee; and

See T. A., 1850, s. 34; T. A., 1852, s. 8; Bankruptcy Act, 1883, s. 147. But the Court has refused to make a vesting order on the appointment of a trustee in the place of a lunatic not so found: *Re M.*, 1899, 1 Ch. 79.

Lunatic not so found.

The Court will not re-appoint a trustee in order to make a vesting order: *Re Dewhirst*, 33 Ch. D. 416.

Re-appointment of trustee.

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

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(*a*) is an infant, or

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found; and

See T. A., 1850, ss. 7–12.

Mortgagor a trustee.

A mortgagor of copyholds, who has covenanted to surrender, or of freeholds by deposit of deeds and memorandum of charge, is a trustee within this subs.; see *Re Crowe*, 13 Eq. 26; *Re D. Jones & Co.*, W. N., 1888, 217; *Re Richard Mills & Co., Ltd.*, W. N., 1905, 36.

Heir of mortgagee.

And the heir of a deceased mortgagee of copyholds is a trustee for the personal representatives: *Re Skitter*, 4 W. R. 791; *Re Franklyn*, W. N., 1888, 217. As to the heir of a deceased vendor, see *Re Cuming*, 5 Ch. 72; *Re Beaufort*, W. N., 1898, 148; and see n. to C. A., s. 4.

Dissolved company.

Whether (*c*) applies to a company which has been automatically dissolved, see *Re General &c. Corporation, Ltd.*, 1904, 1 Ch. 147; *Re Richard Mills & Co., Ltd., sup.*; and *contrà Re Taylor*, 1904, 2 Ch. 737.

Estates tail.

As to estates tail, see note on s. 32, *inf.*

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

See T. A., 1850, s. 13.

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

See T. A., 1850, s. 14.

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

See T. A., 1850, s. 15; C. A., s. 30; *Re Pilling*, 26 Ch. D. 432; Seton, 6th ed., 1235; *Re Williams*, 36 *ib.* 231; and for meaning of "devisee," see s. 50, *inf.*

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on

behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

See T. A., 1852, s. 2; and as to the extent of operation of that s., and what is wilful refusal and neglect, see *Re Mills*, 37 Ch. D. 312; 40 *ib.* 14; and compare *Re Knox*, 1895, 2 Ch. 483—a case on s. 35 (ii.) (d). Also compare Judicature Act, 1884, s. 14.

A petition for an order under this subs. should not be presented before the twenty-eight days have run out: see *Re Knox*, 1895, 1 Ch. 538.

A mortgagor may be within this subs.: *Re Crowe*, 13 Eq. 26. Mortgagor.

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

A person absolutely entitled can obtain an order vesting the land in himself: *Re Godfrey*, 23 Ch. D. 205. "Any such person."

Provided that—

(*a*) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

See T. A., 1850, s. 34; T. A., 1852, s. 8.

(*b*) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

See T. A., 1850, s. 10. It was decided on that s. that a vesting order thereunder did *not* sever the joint tenancy: *Smith* v. *S.*, 3 Drew, 72; *Re Marquis of Bute*, John. 15 (*Re Pearson*, 5 Ch. D. 982, was a case on T. A., 1850, s. 3, as to the jurisdiction in Lunacy, and

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seems to have been decided "*per incuriam*": see *Re Vicat*, 33 Ch. D. 103; s. 3 is worded much the same as s. 10, and the cases on s. 10 are not mentioned in *Re Pearson*); and it is submitted, that having regard to the wording of this s., and of s. 32, *inf.*, no such question arises under this Act.

"With some other person."

The Court will not insist on "some other person" being brought in, though the result be a diminution in the number of trustees: see *Re Price*, W. N., 1894, 169; *Oddy* v. *Hardcastle*, 39 Sol. J. 134; *Re Lees*, 1896, 2 Ch. 508; *Re Fitzherbert*, W. N., 1898, 58 (8).

For forms of orders under this s., see Seton, 6th ed., 1210 *et seq.*; 1228 *et seq.*

Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

See T. A., 1850, s. 16. For forms of orders, see Seton, 6th ed., 1229.

"Unborn persons": see note to s. 31, *inf.*

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

See T. A., 1850, ss. 7, 8.

Mortgagee of copyholds.

For an order vesting in the executors of a mortgagee of copyholds the estate of his infant customary heir, see *Re Franklyn*, W. N., 1888, 217; Seton, 6th ed., 1235, and see the forms on p. 1230.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land

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in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely,—

(*a*) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(*b*) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(*c*) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(*d*) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

This s. replaces T. A., 1850, s. 19.

"Reconveyance": this has been held to include a transfer by the heirs of a mortgagee to his executors: *Re Boden*, 1 D. M. & G. 57; 9 Ha. 820; *Re Lea*, 6 W. R. 482; but *qu.* whether in these cases the order could not have been made under s. 7 or s. 9 of the T. A. 1850 (s. 26 of this Act); see *Re Skitter*, 4 W. R. 791; *Re Franklyn*, W. N., 1888, 217, without putting a forced meaning on the word "reconveyance."

Mortgagee's refusal.

The conditions made necessary by subs. (*b*) are stricter than those required by s. 26 (vi.), to enable a vesting order to be made on a *trustee's* refusal. The mortgagee's refusal must have been *in writing* or a proper conveyance must have been tendered him: see *Rowley* v. *Adams*, 14 Beav. 130.

Survivor of devisees.

Subs. (*c*) is not extended to the case of uncertainty as to which was the survivor of several personal representatives; the fact is immaterial.

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The estate passes to the personal representatives for the time being, except in the case of copyholds: see C. A., s. 30.

Subs. (*e*) applies, pending litigation in the Probate Division as to a will appointing executors of a surviving mortgagee: see *Re Cook*, 1895, 1 Ch. 700.

For form of order, see Seton, 6th ed., 1234.

Vesting order consequential on judgment for sale or mortgage of land.

30. Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein *as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made*, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

The words in italics are repealed by T. A., 1894, s. 1. But for the repeal the s. might be held to be limited to the case of a sale or mortgage for debts: see *Weston* v. *Filer*, 5 De G. & Sm. 608. With the repeal, it replaces T. A., 1850, s. 29, as extended by T. A., 1852, s. 1 (see *Beckett* v. *Sutton*, 19 Ch. D. 646, for the extent of the latter s.), and extends the powers of those ss. to vesting orders on mortgages, which, though made under them in practice, were not in terms authorized.

The powers of this s. extend to sales under s. 5 of the Intestates Estates Act, 1884: see the Interpretation Act, 1889, s. 38 (1).

Sale in lieu of partition.

This s. as well as the next s. applies to the case of a sale in lieu of partition: *Beckett* v. *Sutton*, *sup.*

Lunatic.

Where a lunatic's estate has been sold by the Court, an order can be made under this s.: *Herring* v. *Clark*, 4 Ch. 167; *Re Stamper*, 46 L. T. 372.

"Bound by judgment."

As to binding persons not parties to proceedings, see *May* v. *Newton*, 34 Ch. D. 347; *Jones* v. *Barnett*, 1900, 1 Ch. 370.

As to the order being conclusive in favour of a purchaser, see C. A., s. 70.

For forms of orders, see Seton, 6th ed., 1261 *et seq.*

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any

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land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

This s. replaces T. A., 1850, s. 30, and s. 7 of the Partition Act, 1868; and compare Judicature Act, 1884, s. 14.

Infant mortgagor in foreclosure action.

For the form of order where an infant is defendant in a foreclosure action, see *Mellor* v. *Porter*, 25 Ch. D. 158—a case which goes into the question when an infant will be given a day to show cause, and when not. Many of the forms of orders (see Seton, 6th ed., 1261 *et seq.*) under this s. are in terms prospective,—and see *Bowra* v. *Wright*, 4 De G. & Sm. 265; but see, as to this, *Mellor* v. *Porter*, *sup.*; *Re Bolton*, W. N., 1888, 243; *Re Shortridge*, 1895, 1 Ch. 278, 285.

It would seem that there must be an order for conveyance to bring a case within this s.: see *Weston* v. *Filer*, 5 De G. & Sm. 608; *Mellor* v. *Porter*, *sup.*

"Unborn persons."

The heir of a living person is an "unborn person" within this s.: *Basnett* v. *Moxon*, 20 Eq. 182.

For a case of election, see *Re Montagu*, 1896, 1 Ch. 549; Seton, 6th ed., 1270.

Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court

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directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

"Conveyance."

This s. combines several enactments in the separate ss. of the T. A., 1850, and the T. A., 1852, enabling vesting orders to be made. It must be read with the definition, in s. 50, *inf.*, of the words "convey" and "conveyance." And see *Re M.*, 1899, 1 Ch. at p. 84

Estates tail.

As to estates tail, see *Re Montagu*, cited on s. 32.

Severance of joint tenancy.

As to a vesting order for the estate of one joint tenant working no severance of the joint tenancy, see note on s. 26 (*b*), above.

Registration in Middlesex.

As to registration of vesting orders in Middlesex, see *Re Calcott & Elvin*, 1898, 2 Ch. 460, 464, 468.

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

"To convey": see s. 50, *inf.*

This s. replaces T. A., 1850, s. 20: and see Judicature Act, 1884, s. 14.

Covenants for title.

The person appointed to convey will give the statutory covenant for title implied by C. A., s. 7 (1) (F), but can give no covenant for title on the part of the person for whom he conveys: *Cowper* v. *Harmer*, 57 L. J. Ch. 460; compare *Re Ray*, 1896, 1 Ch. 468—a case under the wider words of s. 124 of the Lunacy Act, 1890.

For forms of orders, see Seton, 6th ed., 1236, 1261 *et seq.*; *Beale* v. *Bragg*, 1902, 1 Ir. R. 99.

Effect of vesting order as to copyhold.

34.—(1.) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2.) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady

of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

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This s. replaces T. A., 1850, s. 28.

See, on the s., Seton, 6th ed., 1236, 1237, 1251; and *Bristow* v. *Booth*, L. R. 5 C. P. 80.

"Free from disability."

The s. does not apply *only* to cases where the persons in whose place the appointment was made were under disability: see *Beckett* v. *Sutton*, 19 Ch. D. 646.

Fines and fees payable on the admission of new trustees to settled copyholds must be borne by the tenant for life and the remaindermen in proportion to the value of their respective interests: *Re Bullock's S. E.*, 91 L. T. 651; Seton, 6th ed., 1775.

35.—(1.) In any of the following cases, namely:—

Vesting orders as to stock and choses in action.

(i.) Where the High Court appoints or has appointed a new trustee; and

Compare T. A., 1850, s. 35; T. A., 1852, s. 6; see also n. to s. 26.

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

"Stock."

For the meaning of "stock," see s. 50, *inf.*

"Chose in action."

Choses in action can be passed by a vesting declaration under s. 12, above.

"Alone."

This subs. applies to two or more joint trustees, both or all infants, &c.: see *Re Hyatt*, 21 Ch. D. 846.

(*a*) is an infant, or

Compare T. A., 1852, s. 3.

Infant-beneficiary.

As to the power of the Court, where an infant is beneficially entitled to stock to declare him a trustee, see *Re Harwood*, 20 Ch. D. 536; *Re Findlay*, 32 *ib.* 221, 641; *Re Barnett*, W. N., 1889, 216; and *cf. Re Kemp*, W. N., 1888, 138.

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found; or

For cases (*b*) (*c*), compare T. A., 1850, ss. 22, 25; and see n. to s. 26.

(*d*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for

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or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

Compare T. A., 1850, ss. 23, 24, 25.

Person absolutely entitled.

New trustees are persons absolutely entitled within this subs.: *Ex p. Russell*, 1 Sim. N. S., 404; *Re Baxter*, 2 Sm. & G. App. v.; *Re Ellis*, 24 Beav. 426.

A petition for an order under this subs. should not be presented before the twenty-eight days have run out: see *Re Knox*, 1895, 1 Ch. 538; and see S. C., on Appeal, 1895, 2 Ch. 483.

(*e*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

Compare T. A., 1852, ss. 4, 5.

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

Compare T. A., 1850, ss. 22, 25.

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

This s. is no help where a surviving trustee has died, leaving no personal representative, and new trustees have been appointed out of Court: *Re Cane*, 1895, 1 Ir. Rep. 172; and see *Re Ellis*, 24 Beav. 426.

Provided that—

(*a*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

Compare T. A., 1850, s. 35.

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

Compare T. A., 1850, ss. 22, 24; T. A., 1852, s. 3; and see *Re Price*, W. N., 1894, 169; and note on s. 26 (*b*), above.

Vesting Orders in Lunacy.

Compare with s. 26 (*b*) and this subs. ss. 135, 136 of the Lunacy Act, 1890, of which s. 135 is in terms wider than either provision of this Act. It would seem that where there has been an appointment, out of Court, of two new trustees, in place of a lunatic and another, the Court in Lunacy cannot, under s. 136, vest stock, direct, in the new trustees, but is bound to bring in the non-lunatic ex-trustee on the way; and it is believed that that Court acts on this view: but see *Re Cutler*, 39 Sol. J. 484; and compare *Re M.*, 1899, 1 Ch. 79.

(2.) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

Compare T. A., 1850, s. 20; Lunacy Act, 1890, ss. 136 (1) (4), 137; *Re C. M. G.*, 1898, 2 Ch. 324.

(3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

Compare T. A., 1850, ss. 26, 55; T. A., 1852, ss, 6, 12.

"All other companies."

As to a foreign company, see n. to s. 50, *inf.*, as to the expression "stock."

(4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

Compare T. A., 1850, ss. 26, 55.

(5.) The High Court may make declarations and give directions concerning the manner in which the right to

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any stock or chose in action vested under the provisions of this Act is to be exercised.

Compare T. A., 1850, s. 31, which contains the same omission of the word "transfer" after "right to," though it is otherwise in the marginal note; and see *Re New Zealand &c. Co.*, 1893, 1 Ch. 403; *Re Gregson*, 1893, 3 Ch. 233; *Re Joliffe*, W. N., 1893, 84; *Re Price*, W. N., 1894, 169; *Re C. M. G.*, 1898, 2 Ch. 324.

(6.) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Compare Merchant Shipping Act Amendment Act, 1855, s. 10, repealed by this Act; and see Merchant Shipping Act, 1894, s. 29.

And see the Local Government (Stock Transfer) Act, 1895, s. 1 (1) (c).

For forms of orders under this s., see Seton, 6th ed., 1212–13, 1238 *et seq.*

Persons entitled to apply for orders.

36.—(1.) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2.) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Compare T. A., 1850, s. 37.

"Interested."

A contingent interest is enough: *Re Sheppard*, 4 D. F. & J. 423. For the distinction between contingent interests which the law will recognize and those which it will not, see *Davis* v. *Angel*, *ib.* 524; *Clowes* v. *Hilliard*, 4 Ch. D. 413; *Re Parsons*, 45 *ib.* 51.

Mode of application.

For mode of application under this Act, see R. S. C., O. 54 b; O. 55 r. 13 a.

Powers of new trustee appointed by Court.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested

in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

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Compare T. A., 1850, s. 33, and C. A., s. 33, and s. 129 of the Lunacy Act, 1890.

Compare also s. 10 (3) of this Act, and see *Re Smith*, 1904, 1 Ch. 139, 144; *Re Perrott & King*, 90 L. T. 156.

This s. replaces C. A., s. 33, which in turn replaced s. 27 of Lord Cranworth's Act, and applied to all instruments past and future. As to the powers of a new trustee appointed by the Court under its ordinary jurisdiction in equity before Lord Cranworth's Act, see *Newman* v. *Warner*, 1 Sim. N. S. 457; Lewin, 11th ed., 743.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

Power to charge costs on trust estate.

This s. replaces T. A., 1850, s. 51. Compare C. A., s. 69 (7), and S. L. A., ss. 46 (6), 47.

The words "by such persons" are new: see *Re Sarah Knight*, 26 Ch. D. 82, 91, 92; see also Judicature Act, 1890, s. 5; *Re Fisher*, 1894, 1 Ch. 53, 450; *Re Knox*, 1895, 1 Ch. 538; 2 Ch. 483.

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Trustees of charities.

This s. replaces T. A., 1850, s. 45. See also, in relation to certain societies for religious purposes, the Trustees Appointment Acts, 1850 to 1890 (the last of which—52 & 53 Vict. c. 19—is cited in the note to s. 10 (1), *sup.*); and the Interpretation Act, 1889, s. 38 (1).

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Orders made upon certain allegations to be conclusive evidence.

53 & 54 Vict. c. 5.

40. Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is the heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

This s. replaces T. A., 1850, s. 44, and s. 140 of the Lunacy Act, 1890.

"Without an heir": why not "without a personal representative"?

This s. does not include an allegation that a trustee or mortgagee has died intestate and *without a personal representative*, which fact, under s. 26 (v) and s. 29 (*e*), is a ground for a vesting order. It was probably considered that as the fact could be ascertained by search in the Probate Court, no other evidence should be allowed.

And see C. A., s. 70, under which, as against a purchaser, an order cannot be invalidated on the ground of want of jurisdiction.

Application of vesting order to land out of England.

41. The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in her Majesty's dominions, except Scotland.

High Court in Ireland.

By T. A., 1894, s. 2, these powers are extended to the High Court in Ireland.

As to the locality of personal estate, see Dicey, Conflict of Laws, 318 *et seq.*, *Re Clark*, 1904, 1 Ch. 294.

Payment into Court by Trustees.

Payment into Court by trustees.

42.—(1.) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

This s. replaces s. 32 of the Legacy Duty Act, 1796; the Trustee Relief Act, 1847; its Amendment Act of 1849, and the Trustee Relief Act (for Ireland), 1848—all which enactments are repealed by this Act.

See R. S. C., O. 54 b, rr. 4, 4 a, and 5; Supreme Court Funds Rules, 1894, r. 41; and the Direction of the Judges of the Chancery Division, given in the Annual Practice, 1905, vol. i., 774.

Money paid in under the Trustee Relief Act was paid out on further consideration of an action and without a petition in *Pullen* v. *Isaacs*, W. N., 1895, 90.

As to payment out generally, see R. S. C., O. 54 b, r. 2; O. 55, r. 13 a; and as to the jurisdiction to decide questions as to the rights of the parties on a petition for payment out, see *Lewis* v. *Hillman*, 3 H. L. C. 607; *Re Bird*, 3 Ch. D. 214; *Re Hoffe*, 82 L. T. 556.

For a case of payment out to executor of a fund paid into Court by

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Payment into the P.O. Savings Bank.

administrator of supposed intestate, where will afterwards found, see *Re Hood*, 1896, 1 Ch. 270.

Under the County Courts Act, 1888, trust funds not exceeding in value £500 may be paid into the Post-office Savings Bank in the name of the County Court Registrar, to attend the orders of that Court; and see County Court Rules, 1903, O. 38.

Compare, with this s., the Judicature Act, 1873, s. 25 (6); the Life Assurance Companies (Payment into Court) Act, 1896, and Rules (R. S. C., O. 54 c; Supreme Court Funds Rules, 1894, r. 41 a).

A trustee should not pay money into Court without reasonable grounds for so doing; see Lewin, 11th ed., 420.

By payment into Court, trustees retire from the trust (*Re Williams*, 4 K. & J. 87), and new trustees can be appointed by the donees of a power (*Re Bailey*, 3 W. R. 31); and the trustees cannot, after payment into Court, exercise discretionary powers of applying the principal or income (*Re Tegg*, 15 L. T. 236; *Re Coe*, 4 K. & J. 199; *Re Nettlefold*, 59 L. T. 315; *Re Murphy*, 1900, 1 Ir. R. 145).

Miscellaneous.

Power to give judgment in absence of a trustee.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Compare T. A., 1850, s. 49.

Power to sanction sale of land or minerals separately.

44.—(1.) Where a trustee is for the time being authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2.) Any such trustee, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

Amendment by T. A., 1894.

This s. is now amended by T. A., 1894, s. 3, by the insertion, after the word "trustee" in the first two places where it occurs, of the words "or other person."

Mortgagee with power of sale.

As amended, it replaces s. 2 of the Confirmation of Sales Act, 1862, and has the effect of extending it to Ireland; and includes a mortgagee with a power of sale: *Re Beaumont*, 12 Eq. 86; *Re Hirst*, 45 Ch. D. 263; *Re Merchants' Trust &c. Co.* (decided under this s. before the Amendment), 38 Sol. J. 253.

As to the mode of application, see R. S. C., O. 54 b, rr. 2, 3, 4 a; and, as to service of the application, *Re Hirst, sup.*, *Re Skinner*, W. N., 1896, 68; *Re Hardstaff*, W. N., 1899, 256.

And see, for orders made under this s., *Re Thomas*, 40 Sol. J. 98; *Re E. of Stamford, ib.* 771; *Re Skinner, sup.*; and for form of order, Seton, 6th ed., pp. 1748–9; *Re Thomas, sup.*

See also S. L. A., ss. 4, 17; S. L. A., 1884, s. 7; S. L. A., 1890, s. 5; and compare C. A., s. 19 (i.), and note.

Power to make beneficiary indemnify for breach of trust.

45.—(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the twenty-fourth day of December one thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

This s. replaces T. A., 1888, s. 6.

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"Breach of trust."

The beneficiary must have been cognizant at least of the facts constituting the breach of trust, if not of their legal effect: *Re Somerset*, 1894, 1 Ch. 231, 274; *Mara* v. *Browne*, 1895, 2 Ch. 69, 91–4. But the interest of the beneficiary may be impounded though he derived no benefit from the breach: *Fletcher* v. *Collis*, 53 W. R. 516; 1905, 2 Ch. 24.

"In writing."

The words "in writing" apply only to the "consent," not to the instigation or request: *Re Somerset, sup.*; *Mara* v. *Browne, sup.* at p. 92.

Discretion of Court.

The Court is not bound, in all events, to enforce this s., but has a discretion, as to which see *Re Somerset, sup.*—especially the judgment of Davey, L. J., at pp. 274–6; and *Bolton* v. *Curre*, 1895, 1 Ch. 544.

Assignee for value.

The interest of the beneficiary can, as before the Act, be impounded as against an assignee for value: *Bolton* v. *Curre, sup.*

As to the nature, apart from the s., of the indemnity to which a trustee is entitled in such a case, see *Re Somerset, sup.*, at p. 275; and *Raby* v. *Ridehalgh*, 7 D. M. & G. 104; *Sawyer* v. *S.*, 28 Ch. D. 595; Lewin on Trusts, 11th ed., 1152 *et seq.*; also, *Bolton* v. *Curre, sup.*

As to primary liability of trustee, who is also beneficiary, as between himself and his co-trustee, see *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685; and compare *Moxham* v. *Grant*, 1900, 1 Q. B. 88. As to considerations applicable to case of married woman restrained from anticipation, see *Bolton* v. *Curre, sup.* As to mode of bringing before the Court, in action against trustees for breach of trust, the question of impounding, see *Re Holt*, 1897, 2 Ch. 525. As to the duties of trustees when requested to commit a breach of trust by a married woman restrained from anticipation, see *Ricketts* v. *R.*, 64 L. T. N. S. 263; *Bolton* v. *Curre, sup.*

Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

Compare T. A., 1850, s. 21.

As to the jurisdiction of the Chancery Courts of the Counties Palatine of Lancaster and Durham, see the Chancery of Lancaster Acts, 1850 to 1890 (13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82; and 53 & 54 Vict. c. 23); and the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47). The jurisdiction of their Common Law Courts was transferred to the High Court of Justice by the Judicature Act, 1873: see s. 16. As to the jurisdiction of county courts, see the County Courts Act, 1888, s. 67 (5); County Court Rules, 1903, O. 38.

PART IV.—MISCELLANEOUS AND SUPPLEMENTAL.

MISCELLANEOUS AND SUPPLEMENTAL.

Application to trustees under Settled Land Acts of provisions as to appointment of trustees.

47.—(1.) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881. 44 & 45 Vict. c. 41.

This s. replaces S. L. A., 1890, s. 17, repealed by this Act; but its operation is wider, inasmuch as the powers and provisions of this Act relating to the appointment of new trustees, &c., are wider than those of the C. A. For instance, they include appointments by the Court.

The repealed s. met the decision in *Re Wilcock*, 34 Ch. D. 508.

Trust estates not affected by trustee becoming a convict. 33 & 34 Vict. c. 23.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

See T. A., 1850, ss. 46, 47; the Forfeiture Act, 1870; and *Re Levy & Debenture Corporation*, 38 Sol. J. 530: where it was held that the Forfeiture Act, 1870, did not apply to property vested in a convict as trustee or mortgagee.

Indemnity.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the

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Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same.

Compare T. A., 1850, ss. 20, 55; T. A., 1852, s. 7.

Definitions.

50. In this Act, unless the context otherwise requires—

The Interpretation Act, 1889, must be borne in mind, in construing this Act.

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

See also the note on s. 36, *sup.*

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land:

As to estates tail and copyholds, see ss. 32, 34, *sup.*

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description:

The expression "instrument" includes Act of Parliament:

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land:

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee:

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connexion with the expression "into Court" include the deposit or transfer of the same in or into Court:

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land:

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

The expression "rights" includes estates and interests:

The expression "securities" includes stocks, funds, and shares; and so far as relates to payments into Court has the same meaning as in the Court of Chancery (Funds) Act, 1872:

35 & 36 Vict. c. 44.

This definition is new; but it does not affect the construction of s. 35, in which the word is not used. It affects s. 42, however.

The expression "stock" includes fully paid-up shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company

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or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein:

"Stock."

"Stock," in T. A., 1850, included shares in a joint stock company (see *Re Angelo*, 5 De G. & Sm. 278), whether fully paid up or not (see that case, and *Re New Zealand &c. Co.*, 1893, 1 Ch. 403, 410–1); and the definition here, so far as relates to vesting orders, seems wide enough to do the same: see also *Morrice* v. *Aylmer*, 10 Ch. 148.

"Any company."

This cannot cover a foreign company outside her Majesty's dominions, or a company in Scotland: see s. 41, *sup.*

As to what is a foreign company, see *Newby* v. *Von Oppen*, L. R. 7 Q. B. 293; *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q. B. D. 519, 522; *Russell* v. *Cambefort*, *ib.* 526, 528.

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

Trust incident to mortgage.

A declaration of trust by a mortgagor for purposes of the security is not within the exception: *London & County Bank* v. *Goddard*, 1897, 1 Ch. 642.

Repeal.

51. The Acts mentioned in the schedule of this Act are hereby repealed except as to Scotland to the extent mentioned in the third column of that schedule.

Extent of Act.

52. This Act does not extend to Scotland.

Short title.

53. This Act may be cited as the Trustee Act, 1893.

Commencement.

54. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

SCHEDULE.

Section 51.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3, c. 52.	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101.	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32.	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96.	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68.	An Act for extending to Ireland an Act passed in the last session of Parliament, entitled "An Act for better "securing trust funds "and for the relief of "trustees."	The whole Act.
12 & 13 Vict. c. 74.	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict. c. 60.	The Trustee Act, 1850.	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
15 & 16 Vict. c. 55.	The Trustee Act, 1852.	Sections one to five, eight, and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82.	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91.	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60.	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty, and thirty-one.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108.	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
27 & 28 Vict. c. 73.	An Act to give further facilities to the holders of Indian stock.	Section four.
26 & 27 Vict. c. 114.	The Improvement of Land Act, 1864.	Section sixty, so far as it relates to trustees; and section sixty-one.
28 & 29 Vict. c. 78.	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40.	The Partition Act, 1868.	Section seven.
33 & 34 Vict. c. 71.	The National Debt Act, 1870.	Section twenty-nine.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
34 & 35 Vict. c. 27.	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78.	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83.	The Local Loans Act, 1875.	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59.	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8.	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41.	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882.	Section five.
46 & 47 Vict. c. 52.	The Bankruptcy Act, 1883.	Section one hundred and forty-seven.
51 & 52 Vict. c. 59.	The Trustee Act, 1888.	The whole Act, except sections one and eight.
52 & 53 Vict. c. 32.	The Trust Investment Act, 1889.	The whole Act, except sections one and seven.
52 & 53 Vict. c. 47.	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5.	The Lunacy Act, 1890.	Section one hundred and forty.
53 & 54 Vict. c. 69.	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13.	The Conveyancing and Law of Property Act, 1892.	Section six.

CHAPTER IV.

THE TRUSTEE ACT (1893) AMENDMENT ACT, 1894. 57 VICT. c. 10.

An Act to amend the Trustee Act, 1893.

[18th June, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of 56 & 57 Vict. c. 53, s. 30.

1. In section thirty of the Trustee Act, 1893, the words "as heir, or under the will of a deceased person, for payment of whose debts the judgment was given or order made" shall be repealed.

See note to T. A., s. 30.

Extension to Ireland of 56 & 57 Vict. c. 53, s. 41.

2. The powers conferred on the High Court in England by section forty-one of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Amendment of 56 & 57 Vict. c. 53, s. 44.

3. In section forty-four of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

See note to T. A., s. 44.

Liability of trustee in case of change of character of investment.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law.

This s. has been held to be not retrospective: *Re Chapman*, 1896, 1 Ch. 323.

As to the law independently of this s., see *Re Medland*, 41 Ch. D. 476; and consider *Re Tucker*, 1894, 1 Ch. 724; *Re Irwin*, 39 Sol. J. 233; *Re Chapman*, 1896, 1 Ch. 323; 2 Ch. 763; *Re Grindey*, 1898, 2 Ch. 593; *Smith v. Patrick*, 1901, A. C. 282; *Re New*, 1901, 2 Ch. 534; *Re Hargreaves*, *ib.*, 547, n.; *Re Smith*, 1902, 2 Ch. 667.

5. This Act may be cited as the Trustee Act, 1893, Amendment Act, 1894. Short title.

PART IV.

MARRIED WOMEN'S PROPERTY ACTS.

CHAPTER I.

SUMMARY OF THE MARRIED WOMEN'S PROPERTY ACTS, 1882 & 1893.

THE general result of these Acts as regards the form and effect of documents is as follows:—

Married woman's power of disposition.

(1.) As to disposal of property or things in action

(*a*) Every woman married after 1882, and

(*b*) Every woman married before 1883, as regards property and things in action acquired after 1882,

can—except where she is a trustee (other than a bare trustee of freehold or copyhold land: see T. A. s. 16)—convey as if she were a feme sole, and the concurrence of her husband in any disposition is not necessary.

Separate use.

(2.) A trust for the separate use of a married woman is no longer necessary. A simple restraint on anticipation, where desired, is effectual (s. 19), even in case of a settlement made by herself of her own property: *Re Lumley*, 1896, 2 Ch. 690.

The decision in *Re Price*, 28 Ch. D. 709, which made it advisable, for the purpose of giving a married woman full powers of testamentary disposition, still to express gifts to be "for her separate use," has been set aside by s. 3 of the M. W. P. A., 1893.

Married woman "protector of settlement."

It may be questioned whether a married woman can alone be protector in respect of a life estate which is her separate property under this Act, but is not expressly

by the settlement settled to her separate use: see Fines & Recoveries Act, s. 24; and compare *Re Smith*, 35 Ch. D. 589; *Re Drummond & Davie*, 1891, 1 Ch. 524.

Acknowledgment.

(3.) Acknowledgment of deeds is only necessary where the property was acquired and the woman was also married before 1883, or where she is a trustee: *Re Harkness & Allsopp*, 1896, 2 Ch. 358. In either case the mode of acknowledgment is now simplified by C. A., 1882, s. 7.

Executrix or trustee.

(4.) It results from the case last cited that a married woman cannot be made an executrix or trustee without inconvenient consequences as regards the mode of dealing with the property. A Bill to amend the law on this point has passed through the House of Lords in the present session.

Power of appointment.

(5.) It is no longer necessary to give a married woman a power of appointment in order to enable her to dispose of property either by deed or will; but a general power may be given to avoid the consequences of the last cited case.

Covenant to settle future property.

(6.) In settlements it is sufficient that she alone covenants to settle her future property. According to the decisions on s. 19 it seems that the covenant of the husband alone still has effect as before the Act to bind the wife's property though made her separate property under the Act. Where the wife is an infant at the time of marriage, her covenant remains in force if she dies without having done any act to avoid it: *Burnaby* v. *Equitable Rev. Int. Soc.*, 28 Ch. D. 416. On attaining twenty-one, and though still under coverture, she can by deed effectually ratify it: *Re Hodson*, 1894, 2 Ch. 421; and see *Viditz* v. *O'Hagan*, 1899, 2 Ch. 569; 1900, 2 Ch. 87. And she may be put to her election to confirm the settlement or take nothing under it unless she is restrained from anticipation: *Willoughby* v. *Middleton*, 2 J. & H. 344; *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Vardon*, 31 Ch. D. 275; *Haynes* v. *Foster*, 1901, 1 Ch. 361: and see, and distinguish, *Harle* v. *Jarman*, 1895, 2 Ch. 419.

Where wife an infant.

Post-nuptial settlement by married woman.

(7.) A covenant by a married woman will no longer be void, but a covenant by her to settle, and also a settlement by her of real or personal estate, will, unless a consideration is given, be voluntary and liable to all the incidents of a voluntary covenant or settlement. The principle of *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, and *Re Foster & Lister*, 6 Ch. D. 87, no longer applies.

(8.) Except that a woman in settling her property has the power, which a man has not, to restrain herself from anticipation during coverture, all settlements by women are now placed on the same footing as settlements by men (s. 19).

Separation deeds.

(9.) A wife can now contract with her husband for purposes of a separation deed, and the concurrence of a trustee is unnecessary to support it as a settlement for value: *McGregor* v. *McG.*, 21 Q. B. D. 424; *Sweet* v. *S.*, 1895, 1 Q. B. 12. For the effect of such a contract on her power to pledge her husband's credit for her necessaries, see *Eastland* v. *Burchell*, 3 Q. B. D. 432; *Wilson* v. *Glossop*, 20 *ib.* 354.

Deeds generally.

(10.) It seems that a document sealed and delivered by a married woman is now her deed at common law, and not merely a writing sealed and delivered, she being for all purposes of property and contract a feme sole; but the Act does not expressly say so.

Equity to settlement.

(11.) The Act seems to render obsolete as to women married after 1882 all the cases as to fraud on the husband's marital rights, and also (except for the purposes of s. 19), as regards property devolving after 1882 on any married woman, all the cases as to reduction into possession, and as to her equity to a settlement.

Joint tenancy.

(12.) It is conceived that under a gift after 1882 to husband and wife in terms which would make them joint tenants if they were not married, they will no longer take as one person or hold by entireties, but take as joint tenants in the same manner as two unmarried persons: see *Thornley* v. *T.*, 1893, 2 Ch. 229; and consequently the joint tenancy would be severed by her covenant to settle after-acquired property, and her interest would be

bound: *cf. Re Hewett*, 1894, 1 Ch. 362. So under a limitation to husband and wife and the heirs of their bodies they will take as tenants in common in tail: see Fearne, C. R. 39, 40. But husband and wife still take only one moiety where there is a gift to them and a third person, without any indication of an intention to displace the technical rule: see *Re Jupp*, 39 Ch. D. 148; *Re March*, 27 Ch. D. 166; *Re Dixon*, 42 Ch. D. 306; *Re Gue*, 67 L. T. 823.

Husband's right to personalty of wife intestate.

(13.) The Act contains no express provision as to whether a husband married after 1882, or a husband married before 1883 in respect to property acquired after 1882, will, in the absence of any disposition by the wife during her life or by will, become absolutely entitled in his marital right to the wife's personal estate on taking out letters of administration, or as tenant by the curtesy of her lands of inheritance. Under the old law equity only interfered just so far as was necessary to give effect to the separate use. By the death of the wife without making any disposition, the separate use was exhausted, and all the husband's rights remained, as if it had never existed: see *Cooper* v. *Macdonald*, 7 Ch. D. 296, per Jessel, M.R. Now (see M. W. P. A., s. 1) the wife takes as a *feme sole*, and is a separate individual: the husband takes nothing in his marital right during the coverture.

Preserved by Statute of Frauds, s. 25.

As regards personal estate, s. 25 of the Statute of Frauds (29 Car. 2, c. 3) gave to the husband beneficially the personal estate of his wife dying intestate, as well as the right to take out letters of administration, and still remains operative: *Re Lambert*, 39 Ch. D. 626; and see *Smart* v. *Tranter*, 43 Ch. D. 587; *Surman* v. *Wharton*, 1891, 1 Q. B. 491; *Re Atkinson*, 1899, 2 Ch. 1. No such question arose on the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), which does not use the words "feme sole," but only the ordinary expressions "separate use" and "separate property," not interfering therefore with the husband's marital rights further than is done by the same expressions used in a settlement or will.

Wife not *feme sole* under Act of 1870.

Estate by curtesy.

(14.) The estate by the curtesy was an extension

during the husband's whole life (arising on birth of inheritable issue) of his freehold in right of his wife during the joint lives (Burton, Real Prop., 145-6), where the estate of the wife was an inheritance in possession. The estate by the curtesy still exists: *Hope* v. *H.* 1892, 2 Ch. 336; but it is conceived that it is wholly changed in its nature. The husband has no present freehold in his wife's right, nor can he have any remainder, there being no particular estate. He must take by *quasi* descent in the same manner as the heir.

The wife's term and chattels.

(15.) The wife's term of years in land, and her chattels passing by delivery, acquired after 1882, no longer vest legally in the husband, nor are they capable of being assigned by him (but qy. where she is a trustee). He must now, it seems (but see *Hope* v. *H.*, *sup.*), take out letters of administration to complete his title on her death; and *Surman* v. *Wharton*, 1891, 1 Q. B. 491, is no authority to the contrary, for there the marriage took place, and the property was the wife's, before 1883.

Wife's joint tenancy in chattels.

(16.) Also marriage is no longer a severance of the wife's joint-tenancy in chattels passing by delivery; it never was of that in freeholds or leaseholds: *Palmer* v. *Rich*, 1897, 1 Ch. 134; or *choses in action: Re Butler's Trusts*, 38 Ch. D. 286.

Coverture now no disability.

(17.) Under the Statutes of Limitation there is no longer in regard to property acquired after 1882 any saving in favour of a wife on account of the disability of coverture. She is free to sue, even as to trust estates: ss. 1 (2), 24.

Paraphernalia, dower and freebench.

(18.) The Act does not enable a donor to make a conveyance or devise to husband and wife which will put them in the same position as before the Act; but see *Tasker* v. *T.*, 1895, P. 1, as to paraphernalia. The Act does not affect her right to dower or freebench, or under the Statutes of Distribution, in respect of her husband's property.

(19.) The Act affords no assistance in the disposition by a woman married before 1883 of property acquired by her before that year. She can still only dispose by acknowledged deed (under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, as amended by C. A. 1882, s. 7) of land or an interest in land or money liable to be laid out in land. She can also, under Malins' Act, dispose of a reversionary interest in personal estate acquired under an instrument dated after 1857, and not being her marriage settlement. The latter Act only applies to a reversionary interest in personal estate, and did not make it clear that either she or her husband separately or together could assign a simple *chose in action*, for instance, a debt or a policy of assurance effected in her name, as distinguished from an equitable *chose in action*, such as a legacy or other money held in trust for her, which would come under the description of personal estate: see *Re Jenkinson*, 24 Beav. 64, at p. 73; *Fryer* v. *Morland*, 3 Ch. D. 675, at pp. 685, 686. But Chitty, J., has decided that the Act applies to a policy of assurance: see *Witherby* v. *Rackham*, 60 L. J. Ch. 511. A covenant made before 1883 by a married woman as to a reversionary interest in personal estate (not within Malins' Act) does not bind it: *Harle* v. *Jarman*, 1895, 2 Ch. 419.

Disability of women married before 1883.

Whether Malins' Act is applicable to *choses in action*.

Under the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29), where a man dies intestate after 1st September, 1890, *leaving no issue*, his widow takes his whole real and personal estate if not exceeding in net value £500, or if exceeding in net value that sum she takes a charge for £500 with interest at 4 per cent. from his death, and also takes the same share and interest in the residue as if it had been the whole real and personal estate and the Act had not been passed. Her charge is paramount to everything, including her right to dower; after her charge is deducted proportionately from the real and personal estate, her rights in the residue are the same as if the £500 had not formed part of the estate. The Court, where necessary, will permit the sum to be raised by sale or mortgage: *Re Charriere*, 1896, 1 Ch. 912; see now L. T. A., 1897, s. 2. The widow's right under the Act may be barred by a provision made for her by settlement and expressed to be in discharge of all claims by her against her husband's estate: *Re Hogan*, 1901, 1 Ir. R. 168.

Widow's right on intestacy, and *no issue*.

As to exemption from Income Tax, of profits, from certain sources, of wife living with her husband, see Finance Act, 1897, s. 5.

Exemption of wife's income from Income Tax.

CHAPTER II.

MARRIED WOMEN'S PROPERTY ACT, 1882.
45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," *and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act* (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The preamble was repealed by the Statute Law Revision Act, 1898.

This Act is retrospective as to procedure: *James* v. *Barraud*, 31 W. R. 786; *Gloucestershire Bg. Co.* v. *Phillipps*, 12 Q. B. D. 536.

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Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

The whole effect of this s. appears to be contained in the words "feme sole" and "without the intervention of a trustee": see *Re Cuno*, 43 Ch. D. 12, 16; *Hope* v. *H.*, 1892, 2 Ch. 336, 341-2. Before the Act it was competent for a married woman to "acquire, hold, and dispose of" property, but she was not entirely in the same position as

a *feme sole*, and the intervention of a trustee was necessary to prevent the legal estate or right vesting in her husband, and to enable it to pass without an acknowledged deed. The words "separate property" are equivalent to "property belonging to her for her separate use:" see *Re Bowen*, 1892, 2 Ch. 291; *Re Armstrong*, 21 Q. B. D. 264; *Re Lumley*, 1896, 2 Ch. 690. This subs., taken by itself, is merely enabling; it does not say whether, in order to enable a married woman to take separate property it must be expressly given to her as such, in the same manner as formerly in case of property given for her separate use. This, however, appears provided for by s. 2 as to a woman married after 1882, and by s. 5 as to a woman married before 1883, in respect to property acquired after 1882. Under these ss. she is "entitled to have and hold, and to dispose of in manner aforesaid, as her separate property," so that an absolute separate title is thereby created, and it seems quite independent of the terms of gift, so that it is not now legally possible to create the old status as to property between husband and wife.

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As to the force of the words "in accordance with the provisions of this Act," see *Re Cuno, sup.*; *Re Harris' S. E.*, 28 Ch. D. 171.

Applies only to property acquired during coverture.

Pearson, J., held that the s. was confined in its operation to property acquired during the coverture, and consequently a will made or republished during widowhood was necessary in order to dispose of property acquired during widowhood: *Re Price*, 28 Ch. D. 709; but see now M. W. P. A., 1893, s. 3.

But a will made before this Act by a married woman dying during the coverture would pass separate property acquired under this Act: *Re Bowen*, 1892, 2 Ch. 291.

Release of power not necessary.

Where property was held in trust for a widow for life for her separate use and after her death for such persons as she should during coverture by will, and when discovert by deed or will appoint, and in default, for her absolutely, so that before her second marriage she was entitled to have it transferred to her absolutely,—it was held that she remained so entitled after her second marriage subsequently to the Act: *Re Onslow*, 39 Ch. D. 622; and see *Re Davenport*, 1895, 1 Ch. 361.

Notwithstanding this Act, a married woman cannot make a valid grant or bequest under a statute (*e.g.* The Gifts for Churches Act, 1803, 43 Geo. 3, c. 108), from the enabling provisions of which "women covert without their husbands" are expressly excluded: *Re Smith*, 35 Ch. D. 589.

General power.

As to the exercise by a married woman of a general power of appointment by will, see s. 4, *post*, and n.

Trust property.

This subs. has been held not to apply to trust property: *Re Harkness & Allsopp*, 1896, 2 Ch. 358.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or

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otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

See also M. W. P. A., 1893, s. 1.

"Contract."

As to "contracts" under this subs., and their nature, see *Scott* v. *Morley*, 20 Q. B. D. 120; *Holtby* v. *Hodgson*, 24 *ib.* 103; *Jay* v. *Robinson*, 25 *ib.* 467; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419. A married woman can make a joint contract, and judgment recovered against the co-contractor bars an action against her: *Hoare* v. *Niblett*, 1891, 1 Q. B. 781; and she can contract with her husband (see *Butler* v. *B.*, 16 Q. B. D. 374; *Ramsay* v. *Margrett*, 1894, 2 Q. B. 18) and they can sue one another for breach of contract: *Butler* v. *B.*, *sup.*; *Sweet* v. *S.*, 1895, 1 Q. B. 12; and she can be sued by him for money lent after, but not before, marriage: *Butler* v. *B.*, 14 Q. B. D., 831; 16 *ib.* 374. As to her covenants, as lessee, running with the land, see *Sutherland* v. *S.*, 1893, 3 Ch. 169, 184, 196.

"Or otherwise."

As to the effect of the words "or otherwise," see *Whittaker* v. *Kershaw*, 45 Ch. D. 320.

Married woman may sue and petition alone.

Under this subs. a married woman may sue alone for a tort committed before the commencement of the Act (*Weldon* v. *Winslow*, 13 Q. B. D. 784; *Lowe* v. *Fox*, 15 *ib.* 667), and for a trespass on a house occupied by her (*Weldon* v. *De Bathe*, 14 Q. B. D. 339), and she may petition alone (*Re Outwin*, 31 W. R. 374; but see *Re Smith*, 35 Ch. D. 589, 596), and is not liable to give security for costs: *Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Supply Association*, 48 L. T. 485; *Re Isaac*, 30 Ch. D. 418; *Re Thompson*, 38 Ch. D. 317, 318; but a married woman, an infant, must appear by next friend or guardian *ad litem*: *Colman* v. *Northcote*, 2 Ha. 147; compare *Shipway* v. *Ball*, 16 Ch. D. 376.

Security for costs.

Disability of coverture.

In cases within this s. coverture has ceased to be a disability within the provisions as to disabilities in the Statutes of Limitations: *Lowe* v. *Fox*, *sup.*; *Weldon* v. *Neal*, 51 L. T. 289.

Tort to separate property.

A husband cannot now sue for a tort to his wife's separate property: *Ruston* v. *Sherras*, 44 Sol. J. 11, and see s. 12.

Undertaking as to damages.

And for purposes of an injunction, her undertaking as to damages is sufficient: *Re Prynne*, W. N., 1885, 144; *Pike* v. *Cave*, 62 L. J. Ch. 937.

Security for costs of appeal.

But where she appeals, having no separate property, and without a next friend, she may be ordered to give security for costs of the appeal:

Whittaker v. *Kershaw*, 44 Ch. D. 296; *Weldhen* v. *Scattergood*, W. N. 1887, 69.

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And where, instead of suing alone, she sues by a next friend who is not a responsible person, security for costs may be required: *Re Thompson*, *sup.*

Suing by next friend.

It would seem, from the last cited case, that a married woman who, after the M. W. P. A., institutes proceedings by a next friend, cannot proceed without one, the next friend being alone liable for costs. But query if this be so where proceedings have, before the Act, been instituted by her by a next friend. She cannot act as next friend or guardian *ad litem* (*Re Duke of Somerset*, 34 Ch. D. 465); and her husband is still liable for her torts: *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, 1900, 2 Ch. 585; and a husband and wife sued jointly for the wife's tort cannot set up separate defences: *Beaumont* v. *Kaye*, 1904, 1 K. B. 292.

Cannot be next friend, &c.

Husband liable for torts.

And as to the wife's right to damages for personal injuries to her, recovered in an action in which she and her husband are co-plaintiffs, see *Beasley* v. *Roney*, 1891, 1 Q. B. 509, and s. 5, *inf.*

Seduction of daughter.

A mother cannot maintain an action for the seduction of her daughter while living with both parents, in the absence of an express contract of service between mother and daughter: *Hamilton* v. *Long*, 1903, 2 Ir. R. 407.

Must have property at date of contract.

Before the M. W. P. A., 1893 (which only applies to contracts entered into after the passing of the Act), it was necessary, in order that a married woman should be liable under this subs., that she should have had separate property free from any restraint on anticipation at the time of the contract (*Re Shakespear*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661); but arrears or savings of an income which she could not anticipate, would do: *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 328; *Butler* v. *Cumpston*, 7 Eq. 16; *Cox* v. *Bennett*, 1891, 1 Ch. 617; *Hood-Barrs* v. *Heriot*, 1896, A. C. 174, but not the clothes of herself and her children: *Leak* v. *Driffield*, 24 Q. B. D. 98.

Restraint on anticipation.

A judgment against a woman upon a contract entered into by her during coverture, whether obtained during or after the cessation of the coverture, cannot be enforced against property, which she is or was during the coverture restrained from anticipating: *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419; and the M. W. P. A., 1893, s. 1, makes no difference in this respect: *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28; and accordingly the judgment cannot be enforced by any kind of process against income which is or was during the coverture subject to the restraint, accrued subsequently to the judgment: see the above cases and *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Re Lumley*, 1896, 2 Ch. 690; *Bolitho & Co., Ltd.*, v. *Gidley*, 1905, A. C. 98; *secus* as to arrears of such income, due and payable at or before the date of the judgment, even though they have not actually come to her hands: *Hood-Barrs* v. *Heriot*, 1896, A. C. 174.

S. 1.

Costs.

Subject to M. W. P. A., 1893, s. 2, the same principles apply to orders for payment of costs by a married woman: *Cox* v. *Bennett*, 1891, 1 Ch. 617; *Re Lumley*, *sup.*

The Court may appoint a receiver of separate property out of which costs are payable: *Cummins* v. *Perkins*, 1889, 1 Ch. 16.

Form of judgment.

The proper form of judgment against a married woman under this subs. was settled by the Court in *Scott* v. *Morley*, 20 Q. B. D. 120 (see also *Downe* v. *Fletcher*, 21 *ib.* 11), limiting execution to the separate property of the married woman not subject to any restriction against anticipation, unless, by reason of s. 19, the property is liable to execution, notwithstanding such restriction (and see, *Softlaw* v. *Welch*, 1899, 2 Q. B. 419—action against widow on contract made during coverture); and a married woman cannot be committed to prison under s. 5 of the Debtors' Act, 1869, for default in payment: *Scott* v. *Morley*, *sup.* For the form of judgment upon a contract made after 4th December, 1893, see *Barnett* v. *Howard*, *sup.*

Devastavit or breach of trust.

Semble, an order to compel a married woman to make good a loss occasioned by her devastavit or breach of trust (see. s. 24) should accord with the form in *Scott* v. *Morley*: *Re Turnbull*, 1900, 1 Ch. 180; but an order for payment into Court of money in her possession as trustee, executrix, or administratrix should, in the absence of evidence that she has committed a breach of trust or devastavit, be in the common form, and she is liable to attachment for non-compliance therewith under s. 4 of the Debtors' Act, 1869: *Re Turnbull*, *sup.*; and judgment in common form can be obtained against a married woman upon contracts made by her before marriage: *Robinson* v. *Lynes*, 1894, 2 Q. B. 577, and see ss. 13, 19; and she is liable to the same procedure for the recovery of poor-rates and other rates recoverable in the same manner as poor-rates, as if she were not a married woman: *Re Allen*, 1894, 2 Q. B. 924.

Judgment under R. S. C., O. 16, r. 52, may be ordered against a married woman, third party, as a *feme sole*, charging her separate estate even in respect of a liability incurred before the Act: *Gloucestershire Bg. Co.* v. *Phillipps*, 12 Q. B. D. 533.

A judgment against a married woman may be the foundation of a garnishee order: *Holtby* v. *Hodgson*, 24 Q. B. D. 103.

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.*

Not retrospective.

This subs. is repealed by M. W. P. A., 1893, s. 4. It was not retrospective: *Conolan* v. *Leyland*, 27 Ch. D. 632.

"Contrary shown."

The contrary was shown, if she had no property but what she could not anticipate: *Harrison* v. *Harrison*, 13 P. D. 180; or but that and her own and her children's clothes: *Leak* v. *Driffield*, 24 Q. B. D. 98.

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.* S. 1.

This subs. is also repealed by M. W. P. A., 1893, s. 4. It was not retrospective: *Conolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Re Roper*, 39 Ch. D. 482. It renders obsolete (see *Cox* v. *Bennett*, 1891, 1 Ch. 617, 622–3) the decision in *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, that the contract of a married woman bound so much only of her separate estate not subject to restraint on anticipation as existed at the date of the contract, and remained when judgment was enforced.

As to the definition of "contract," see s. 24.

"Thereafter," *i.e.* during the coverture: *Beckett* v. *Tasker*, 19 Q. B. D. 7; or a subsequent coverture: *Jay* v. *Robinson*, 25 Q. B. D. 467; but property acquired by her when discovert, as well as separate property which she cannot anticipate, is not bound: *Pelton Brothers* v. *Harrison*, 1891, 2 Q. B. 422.

The M. W. P. A., 1893, applies only to contracts entered into after the passing of the Act, and it repeals the two preceding subss. absolutely. But their effect as to acts done under them is preserved: see Interpretation Act, 1889, s. 38 (2), (*b*) and (*c*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Married woman not trading.

A married woman who does not carry on a trade is not subject to the bankruptcy law: see *Re Gardiner*, 20 Q. B. D. 249; *Re a Debtor*, 1898, 2 Q. B. 576; and *per* Esher, M.R., in *Holtby* v. *Hodgson*, 24 Q. B. D. 105, 106.

A married woman cannot be made bankrupt under a bankruptcy notice on a judgment in the form in *Scott* v. *Morley* (see *Re Lynes*, 1893, 2 Q. B. 113; *Re F. Handford & Co.*, 1899, 1 Q. B. 566); nor can a widow: *Re Hewett*, 1895, 1 Q. B. 328; and see *Re Beauchamp*, 1904, 1 K. B. 572.

A married woman carrying on trade in partnership with her husband does not carry on trade separately from him: *Re Helsby*, 1 Manson, 12; but one carrying on a business of her own, under her husband's management, does: *Re Edwards*, 43 W. R. 509; *Re Worsley*, 1901, 1 K. B. 309.

Married woman's general power.

A married woman on becoming bankrupt cannot be required to exercise in favour of the trustee in bankruptcy a general power of appointment (*Ex p. Gilchrist, Re Armstrong*, 17 Q. B. D. 521), but

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her life interest settled to her separate use passes to the trustee notwithstanding s. 19: *Re Armstrong, Ex p. Boyd*, 21 Q. B. D. 264, and if subject to a restraint on anticipation, becomes assets for her creditors on the removal of the restraint by the death of her husband in her lifetime: *Re Wheeler*, 1899, 2 Ch. 717.

As to what constitutes separate business, see *Re Dearmer, James* v. *Dearmer*, W. N., 1885, 212; *Lovell* v. *Newton*, 4 C. P. D. 7; *Smith* v. *Hancock*, 1894, 2 Ch. 377; and as to when and how long a trade is "carried on": *Re Dagnall*, 1896, 2 Q. B. 407; *Re Worsley, sup.*

Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Accordingly the examination of a woman married since 1882, as to her consent under S. E. A., s. 50, is not necessary: *Riddell* v. *Errington*, 26 Ch. D. 220; *Re Robinson's S. E.*, 38 Sol. J. 325 (but see *Re Smith*, 35 Ch. D., 589, 596). And in the case of a deed executed by her under s. 40 of the Fines and Recoveries Act, with respect to her own property, the husband's concurrence and acknowledgment by her are not required: see *Re Drummond and Davie*, 1891, 1 Ch. 524.

Fines and Recoveries Act.

Settlement.

As to the effect of a settlement on the rights given to a married woman by this s., see n. s. 19.

Trustee.

As to property vested in a married woman as trustee, see s. 18 and n. thereto.

As to a married woman's exemption from Income Tax, see Finance Act, 1897, s. 5.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims

of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

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The words "other estate" include any property whatsoever: *Re Donaldson*, 1902, 2 Ir. R. 310.

"Other estate."

The s. does not apply to a loan by a wife to her husband for purposes unconnected with his trade or business: *Re Tidswell*, 56 L. J. Q. B., 548; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; *Re Clark*, 1898, 2 Q. B. 330 (dissenting from *Alexander* v. *Barnhill*, 21 L. R. Ir. 511.)

"Or otherwise."

The wife must make out a *primâ facie* case that the loan was not made to the husband for the purpose of his business: *Re Cronmire*, 1901, 1 K. B. 480, in which case it was said that *Re Genese*, 16 Q. B. D. 700, does not decide that the onus is in every case thrown on the wife.

When applicable.

If the loan is made to a trading partnership of which the husband is a member, the wife, so far as respects the joint estate, is not postponed to other creditors: *Re Tuff*, 19 Q. B. D. 88.

Partnership.

It is conceived that this s. leaves the wife free to enforce any security she takes from her husband for the loan: compare *Ex p. Sheil*, 4 Ch. D. 789; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 *ib.* 238.

This s. is not retrospective: *Re Home*, 54 L. T. 301.

The s. applies, by virtue of s. 10 of the Judicature Act, 1875, in the administration by the Court of the husband's insolvent estate: *Re Leng*, 1895, 1 Ch. 652; except that, if the widow is executrix or administratrix, her common law right of retainer is unaffected: *Re May*, 45 Ch. D. 499; *Re Ambler*, 1905, 1 Ch. 697.

Husband's insolvent estate.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Execution of general power.

See *Re Hodgson*, 1899, 1 Ch. 666.

This s. applies, as to contracts made during coverture, only to those made after the commencement of the Act: *Re Roper*, 39 Ch. D. 482; but applies to those, whether the married woman at their date had separate property or not: *Re Ann*, 1894, 1 Ch. 549. It applies to contracts made by the testatrix when a "feme sole," whether before the Act or not: *Re Hughes*, 1898, 1 Ch. 529. As to the law apart from the Act, see *Re Roper*; *Re Ann*; *sup.*; *Pike* v. *Fitzgibbon*, 17 Ch. D. at p. 466; and *Re Parkin*, 1892, 3 Ch. 510, as to ante-nuptial contracts.

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Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

When title must accrue.

"Spes successionis."

The date when the title, whether vested or contingent, was acquired to any property, and not the date when it falls into possession, governs the application of the Act (*Reid* v. *Reid*, 31 Ch. D. 402; *Re Dixon*, 35 *ib.* 4); but a mere "spes successionis" is no title: *Re Parsons*, 45 Ch. D. 51.

Separate examination.

Separate examination of a married woman for purposes of the S. E. A. is not required where her interest in the settled property was acquired after this Act: *Re Batt's S. E.*, 1897, 2 Ch. 65.

Special power.

Under an exercise of a special power, title accrues when the power is exercised, not when it is created: *Re Crawshay*, 1891, 3 Ch. 176, 180; *Sweetapple* v. *Horlock*, 11 Ch. D. 745; *Re Butler*, I. R. 3 Eq. 138; Farwell on Pow., 2nd ed., p. 289.

A will, made before the Act, by a married woman, will, independently of s. 3 of the M. W. P. A., 1893, pass separate property accruing to her under this s.: *Re Bowen*, 1892, 2 Ch. 291.

This s. includes money recovered by the verdict of a jury: *Beasley* v. *Roney*, 1891, 1 Q. B. 509.

As to the effect of a settlement upon this s., see n. to s. 19.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name, of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act

are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman shall be sufficient primâ facie evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

This s. applies to funds in the sole name of a married woman at the commencement of the Act, although "name," and not "sole name," occurs in the 15th line. The next s. applies to those subsequently transferred to her sole name.

This s. uses the old expressions "separate property of a married woman," and "separate use," but nothing seems to arise thereon. The words seem to be used as equivalent expressions: see first note to s. 1 (1) of this Act.

As to the law under the M. W. P. A., 1870, see that Act, ss. 3–5, and *Howard* v. *Bank of England*, 19 Eq. 295.

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or

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transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married women and others.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other persons, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to the law before this Act, see note to s. 6, *sup.*

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

As to stock, &c., standing in the joint names of a married woman and others.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Fraudulent investments with money of husband.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under policy of assurance not to form part of estate of the insured.

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A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

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On the general features of the s., compared with those of s. 10 of the M. W. P. A., 1870, see *Re Turnbull*, 1897, 2 Ch. 415.

"Objects therein *named*": see *Re Browne*, 1903, 1 Ch. 188.

Points arising on s. 11.

The following points seem to arise on this s., and may, it is conceived, be answered or explained as follows:—

Policy effected by married woman.

1. A policy effected by a married woman remains her separate property if the object in whose favour it is effected fail, and can be disposed of by her as a *feme sole* (see ss. 1, 24): see *Cleaver* v. *Mutual Reserve Fund Life Association*, 1892, 1 Q. B. 147.

When interests vest under.

2. If the policy is effected by a man for the benefit of his wife and children, or by a woman for the benefit of her husband and children, the beneficiaries acquire, at the time or in the event specified in the policy, vested interests in like manner as in case of an ordinary policy effected and assigned to trustees on trust. If the wife or husband is to take a life interest only, it should be so expressed: if there be no direction to the contrary, the wife and children take as joint tenants: see *Re Seyton*, 34 Ch. D. 511, dissenting from *Re Adam*, 23 Ch. D. 529; *Re Davies*, 1892, 1 Ch. 90, following *Re Seyton*. And if the wife, living at the date of the policy, dies, a subsequent wife and her children are entitled to participate jointly with the first wife's children: *Re Browne, sup.*, and compare *Re Griffiths*, 1903, 1 Ch. 739 (a case on the M. W. P. A., 1870). If the policy is effected by a man or his wife for the benefit of the other alone it should be expressed that that other shall take only in case of surviving, as otherwise there will be an immediate right to dispose of it.

How policy should be expressed.

Policies effected under this s. by unmarried persons.

3. The power to effect a policy is not, it seems, as in the Act of 1870, confined to a married man or woman. An unmarried man or woman may under this s. effect a policy for any future wife or husband and children.

Issue other than children not within this s.

4. Children only and not issue generally are within the s.

Effect of this s. on policy, and its surrender.

5. The policy under this s. is in effect a complete settlement of personalty incapable of being defeated by the person making it though there be no wife or children yet in existence: compare *Re Atkinson*, 39 Sol. J. 655. Nor can the insured surrender the policy; but perhaps (there being no covenant to keep up the policy) it might be exchanged for a policy for a smaller sum on the same life and free of premium, this being the only mode of preserving the policy if the premium cannot be paid.

Failure of objects.

6. In the absence of wife or husband or child capable of taking under the trusts, the policy is part of the estate of the insured, and would pass to his or her trustee in bankruptcy: see *Cleaver* v. *Mutual &c. Association, sup.* A general power to surrender should not be reserved. If it were reserved, or could be implied, it could be exercised by the trustee in bankruptcy and thus defeat the settlement. The only power reserved (if any) should be to apply bonuses in reduction of premiums, or to surrender in exchange for a policy of smaller amount at a reduced premium, or with all premiums paid up.

Powers to be reserved.

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Declaration of trusts.

7. Though this s. does not, like the Act of 1870, say that wife and children are under the policy to take "according to the interest expressed," yet the trusts of the policy money may, it is conceived, be moulded in any way the insured desires for the benefit of wife and children.

Notice.

8. The words "in default of notice to the insurance office" mean in default of notice of appointment of trustees of the policy money. But during the insured's life, where there are no trustees, notices of assignments and charges must, it is conceived, be given to the office, there being no one else to receive them, and the office must record and acknowledge them as in case of an ordinary policy. No other notice seems possible. Nevertheless the office may pay the money to the trustees thereof when appointed, or, if none, to the insured's personal representatives, but should in each case hand over copies of the notices.

Stamp.

9. Assuming the policy to have no money value, no settlement stamp beyond the 10*s.* for a Declaration of Trust is payable, there being no provision made for keeping up the policy: see Stamp Act, 1891, s. 104.

In whom policy vests.

10. The s. does not expressly authorize the appointment of trustees of the policy, but only trustees of the money payable under the policy. If no trustee is appointed, the policy being in the name of the insured vests in him.

Powers of trustees.

11. If trustees are appointed it is not expressly stated that the policy is to vest in them, but their receipts are made a discharge for the policy money; consequently under the Policies of Assurance Act, 1867, they have a legal right to sue on the policy, if notice is given according to s. 3 of that Act, and this seems in effect to vest the policy in them in the same manner as an assignment on trust.

Appointment of trustees.

12. If the policy names trustees it does not seem necessary to the effectual appointment of such trustees that the insured should sign the policy, but he or she must sign any separate writing appointing trustees.

General effect of this s.

13. Having regard to the other provisions of the Act, the effect of this s. seems to be only to render unnecessary a deed assigning the policy to trustees upon trust, and (see *Holt* v. *Everall*, 2 Ch. D. 273) to prevent the settlement from coming within s. 91 of the Bankruptcy Act, 1869, or s. 47 of the Bankruptcy Act, 1883: see s. 152 of that Act.

Satisfaction of covenant.

Whether a covenant in a settlement to pay a sum to be held on trusts for the wife and children could be satisfied by effecting a policy under this s., see *Re Cartwright*, 72 L. J. Ch. 622.

Title of petition.

A petition for appointment of new trustees of a policy under M. W. P. A., 1870, s. 10, may be entitled only under that Act: *Re Adam*, 23 Ch. D. 525; *Re Turnbull*, 1897, 2 Ch. 415; *Re Kuyper*, 1899, 1 Ch. 38; *contra*, *Re Soutar*, 26 Ch. D. 236. A single trustee of a policy may be appointed though there is an infant, *Re Adam*; *Re Turnbull*, *sup.*; *contra*, *Re Howson*, W. N., 1885, 213.

Single trustee appointed.

Exchange of policy.

A policy effected under s. 10 of M. W. P. A., 1870, by a man on his own life for the benefit of his wife and children was authorized to be exchanged for another policy for a smaller sum, with premiums fully paid up, in *Schultze* v. *S.*, 56 L. J. Ch. 356.

Endowment policies.

It has been questioned whether this s. applies to an endowment policy creating a trust for wife and children, that is, a policy under which the money is payable not only on death, but also on surviving a certain age. Such a policy is an ordinary life policy with the benefit accelerated, and seems to come within the definition of a "policy effected by a man on his own life." It would at all events operate as a valid settlement subject to s. 47 of the Bankruptcy Act, 1883.

As to the legality and effect of a policy effected for purposes similar to those of this s., but not under the s., see *Re Davies*, 1892, 3 Ch. 63.

County Court.

As to proceedings in the County Court under this s., see County Court rules, 1903, O. 46, r. 1.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceedings shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Tort to separate property.

A husband cannot now sue for a tort to his wife's separate property: *Ruston* v. *Sherras*, 44 Sol. J. 11.

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Statutes of Limitation.

A married woman's debt to her husband is within the Statutes of Limitation: *Re Lady Hastings*, 35 Ch. D. 94.

As to her right in equity against her husband's estate in respect of her separate property of which she was deprived by him, see *Wassell* v. *Leggatt*, 1896, 1 Ch. 554; the Statutes of Limitation do not run against her. She may claim the return of chattels wrongfully detained by her husband or their value: *Larner* v. *L.*, W. N. 1905, 116.

Injunction.

An injunction may be granted on the application of a married woman on her sole undertaking as to consequential damages: *Re Prynne*, 53 L. T. 45; W. N., 1885, 144; *Pike* v. *Cave*, W. N., 1893, 91. And a husband is not debarred from proceeding against his wife under such an undertaking by the prohibition in this s. in regard to his wife's torts: *Hunt* v. *H.*, 54 L. J. Ch. 289; W. N., 1884, 243.

Defamatory libel.

A married woman may not take criminal proceedings against her husband for a defamatory libel: *Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772.

As to this s. see *Reg.* v. *Brittleton*, 12 Q. B. D. 266; *Reg.* v. *Streeter*, 1900, 2 Q. B. 601; *Rex.* v. *James*, 1902, 1 K. B. 540; and M. W. P. A., 1884; Criminal Evidence Act, 1898, s. 4.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate

use under the Acts hereby repealed or otherwise, if this Act had not passed.

SS. 13, 14.

Debt as devisee.

The liability of a female devisee of land to satisfy the debts of the testator arising on her settling the land on her marriage, is a debt "contracted by her before marriage," and her life interest under the settlement is liable, notwithstanding a restraint on anticipation: *Re Hedgely*, 34 Ch. D. 379; and see s. 19 *inf.*; and "before her marriage" means "before her existing marriage," not "any marriage": *Jay* v. *Robinson*, 25 Q. B. D. 467.

"Debts contracted" include debts contracted under the Act in respect of her separate property during a previous marriage: *Jay* v. *Robinson, sup.*

As to the liabilities of husband and wife under this and the two following ss., see *Beck* v. *Pierce*, 23 Q. B. D. 316, cited on s. 15, *post.*

Female contributory.

As to the liability, apart from these ss., of a man who marries a female contributory, see the Companies Act, 1862, s. 78; Buckley on the Companies Acts, 8th ed., pp. 86, 246.

"Liability in damages *or otherwise*," *e.g.* to specific performance, see *Smith* v. *Lucas*, 18 Ch. D. 531, 543.

The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by this Act: *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.

As to her liability apart from the Act, see *Smith* v. *Lucas*; *Beck* v. *Pierce, sup.*; *Re Parkin*, 1892, 3 Ch. 510; *Scott* v. *Morley*, 20 Q. B. D. 120, 123-4; *Robinson* v. *Lynes, sup.*; *Chubb* v. *Stretch*, 9 Eq. 555; *Vanderheyden* v. *Mallory*, 1 Comstock (New York Appeals), 452.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such

SS. 14, 15.

debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

See, as to a husband's liability apart from the Act, *Beck* v. *Pierce*, 23 Q. B. D. 316, cited on the next s.

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Liability of husband.

The liability of the husband is not a joint liability only, hence an unsatisfied judgment against the wife alone is no defence to an action against the husband; he can be sued without her whether she be alive or dead, and the statute runs in his favour from the time when the cause of action accrued against her, and not from the marriage: *Beck* v. *Pierce*, 23 Q. B. D. 316.

SS. 16, 17.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Act of wife liable to criminal proceedings.

Formerly (see *Reg.* v. *Brittleton*, 12 Q. B. D. 266) in criminal proceedings under this s. a husband's evidence could not be received against his wife: but see now the M. W. P. A., 1884, s. 1; and the Criminal Evidence Act, 1898, s. 4; and see also on this s. *Reg.* v. *Streeter*, 1902, 2 Q. B. 601; *Rex* v. *James*, 1902, 1 K. B. 540.

Evidence in criminal cases.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body or society as aforesaid, in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in

Questions between husband and wife as to property to be decided in a summary way.

SS. 17, 18.

the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court. Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

An inquiry was ordered under this s. in *Phillips* v. *P.*, 13 P. D. 220, and in *Tasker* v. *T.*, 1895, P. 1; and see *Gaynor* v. *G.*, 1901, 1 Ir. R. 217. The registrar of the P. D. has no jurisdiction to make an order under this s.: *Wood* v. *W.*, 14 P. D. 157.

As to proceedings in the County Court under this s., see County Court Rules, 1903, O. 46, r. 2.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stock or funds, or of any other stocks or funds transferable aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that

character, without her husband, as if she were a feme sole. SS. 18, 19.

Trust and mortgage estates.

A married woman, trustee of land, cannot convey it except with her husband's concurrence and by deed acknowledged; *Re Harkness & Allsopp*, 1896, 2 Ch. 358, unless she is a bare trustee: T. A., s. 16, which however does not apply to leaseholds. In the case of leaseholds the husband must assign, but the deed does not require to be acknowledged. It seems that *Re Harkness & Allsopp, sup.*, would apply to land which a married woman had covenanted to settle; see Lewin, 11th ed., 156. Where she is a mortgagee for her own money, she can convey as a feme sole: *Re Brooke & Fremlin*, 1898, 1 Ch. 647. Where the mortgage debt is trust money, see note to T. A., s. 16. To avoid any question, a power of appointment should be given to mortgagees where one of them is a woman.

By s. 24 the husband of a trustee, executrix, or administratrix, is freed from all liabilities of the wife in those characters, unless he has acted or intermeddled in the trust or administration: and query whether his concurrence in the wife's conveyance would not amount to acting or intermeddling: see *Urch* v. *Walker*, 3 My. & Cr. 702; *Crewe* v. *Dickin*, 4 Ves. 97.

Receipts.

An order for payment to a married woman as executrix should contain the words "on her separate receipt": *Re Hawksworth*, W. N., 1887, 113; Seton, 6th ed., p. 221.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

SS. 19, 20.

Settlement need not be valid against wife.

"Interfere with or affect": in *Re Armstrong*, 21 Q. B. D. 264, Lindley, L.J., said the words "interfere with or affect any settlement" mean "invalidate or render inoperative any settlement" (and see *Re Onslow*, 39 Ch. D. 622, 625; *Re Lumley*, 1896, 2 Ch. 690, 694); but it is not necessary that the settlement should be valid and operative as against the wife. If it would have bound the property if the Act had not been passed, this s. prevents either s. 2 or s. 5 from interfering with it: *Hancock* v. *H.*, 38 Ch. D. 78 (covenant by husband alone for settlement of wife's after-acquired property); *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307 (assignment by husband and infant wife of a sum belonging to her); *Buckland* v. *B.*, 1900, 2 Ch. 534 (agreement binding on husband for settlement of property belonging to infant wife). The principle of all these cases is that, if the property would have been bound by the husband's covenant or assignment if the Act had not been passed, then by force of this s. it is bound notwithstanding ss. 2 and 5. The s. includes settlements "made or to be made," *i.e.* either before or after the Act (see *Stevens* v. *Trevor-Garrick*, *sup.*), and "whether before or after marriage." Hence the result of the above decisions appears to be that a husband can deprive his wife of her separate property under the Act, to the extent to which he could have bound it, if the Act had not been passed, by merely executing a voluntary covenant to settle it, and as the nature of the settlement is not specified, it would seem that he need not even settle it on his wife or issue.

Covenant to settle.

Under this s. a covenant for the settlement of all the property of the wife except that limited to her separate use will still include property not given to her separate use, but to which under this Act she becomes entitled as her separate property: *Re Stonor*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227.

Bankruptcy.

This s. does not prevent the interest under a settlement of a married woman trading separately from her husband vesting in her trustee in bankruptcy under s. 1 (5), but any restraint on anticipation remains operative during the husband's life: *Re Armstrong*, *sup.*; *Re Wheeler*, 1899, 2 Ch. 717.

Restraint on anticipation.

In a settlement made since the Act a restraint on anticipation may be effectually annexed to the estate of a married woman though not in terms limited to her separate use: *Re Lumley*, *sup.*

Ante-nuptial debt.

"Debts contracted by her before marriage": see *Jay* v. *Robinson*, 25 Q. B. D. 467, cited on s. 13, *sup.*; *Birmingham &c. Society* v. *Lane*, 1904, 1 K. B. 35.

Position of creditors.

The last clause of this s. relates only to settlements made since the Act: *Beckett* v. *Tasker*, 19 Q. B. D. 7, 12. For an attempt to avoid a settlement under this clause, see *Hemingway* v. *Braithwaite*, 61 L. T. 224.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon

application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

SS. 20, 21, 22.

31 & 32 Vict. c. 122.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

22. *The Married Women's Property Act,* 1870, *and the Married Women's Property Act* (1870) *Amendment Act,* 1874, *are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.*

Repeal of 33 & 34 *Vict.* c. 93. 37 & 38 *Vict.* c. 50.

Repealed by the Statute Law Revision Act, 1898.

The effect of this s. seems to be to preserve the Act of 1870 as to all policies effected under it, and therefore an Insurance office must for its protection require the appointment of a trustee according to that Act

How far Act of 1870 preserved.

SS. 22, 23, 24, 25, 26, 27.

and cannot safely pay to any other trustee or to the personal representative of the person whose life is insured, as provided by this Act: see *Re Turnbull*, 1897, 2 Ch. 415; *Re Kuyper*, 1899, 1 Ch. 38.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

In *Surman* v. *Wharton*, 1891, 1 Q. B. 491, it was held that a husband taking his intestate wife's leaseholds "jure mariti" and without letters of administration, was her "legal personal representative" within this s.

As to a husband's liability, *quâ* personal representative of his wife, for her ante-nuptial contracts, see *Re Parkin*, 1892, 3 Ch. 510.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

See on this s. *Re Turnbull*, 1900, 1 Ch. 180.

Administration bond.

It is not necessary now that the husband of a married woman should join in the administration bond on grant to her of letters of administration: *Re Ayres*, 8 P. D. 168.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

As the M. W. P. A., 1884, relates solely to the giving of evidence in criminal matters, by husband and wife, it is not inserted.

CHAPTER III.

RULES AS TO PROBATE OF WILLS OF MARRIED WOMEN AND WILLS OF WIDOWS MADE DURING COVERTURE.

AMENDED RULES, ORDERS, and INSTRUCTIONS for the REGISTRARS of the PRINCIPAL PROBATE REGISTRY and for the DISTRICT PROBATE REGISTRARS, in NON-CONTENTIOUS BUSINESS. (29th March, 1887.)

RULE 15 of the Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry in non-contentious business, dated 30th July, 1862, and Rule 18 of the Rules, Orders, and Instructions for the District Probate Registrars in such business, dated the 27th January, 1863, are respectively repealed, save so far as concerns anything done or proceeding taken in accordance with them, and in place of the said Rules it is ordered that the following Rules shall take effect:—

Rules 15 and 18.—In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor, or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next-of-kin of the testatrix in case of a partial intestacy.

The forms of instruments annexed to the before-mentioned Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry, numbered 12, 13, and 14, and in the Rules, Orders, and Instructions for the District Probate

Registrars, numbered 13, 14, and 15, and thereby directed to be adopted as nearly as the circumstances of the case will allow in respect to the wills of married women, shall cease to be adopted in respect of such wills, except so far as the same may be applicable to oaths sworn before these Rules and Orders take effect, and also except so far as the same may be applicable to any second or subsequent grants required to complete the representation in cases where limited or special grants have already issued.

Effect of new probate rules.

As to the effect of the new rules, see *Smart* v. *Tranter*, 43 Ch. D. 587. They relate to mere matter of machinery, and do not affect beneficial interests. Where the wife has no power to dispose by will of property away from her husband, her executors are trustees of such property for him ; and his taking probate of her will in general form does not involve his assent to the will as a disposition of property of which, without his assent, she could not dispose: *Re Atkinson*, 1899, 2 Ch. 1; and see *Elliott* v. *North*, 1901, 1 Ch. 424, 430, 431, 434. Administration will be granted to the husband in respect of property which she has no power to dispose of by the will: *In b. Leman*, 1898, P. 215; *In b. Donovan*, 78 L. T. 567; *In b. Davis*, W. N., 1899, 61.

CHAPTER IV.

MARRIED WOMEN'S PROPERTY ACT, 1893.
56 & 57 VICT. c. 63.

An Act to amend the Married Women's Property Act, 1882.
[5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

"Contract hereafter entered into."

An acknowledgment after the Act of a pre-existing debt is not a contract entered into after the Act: *Re Wheeler*, 1904, 2 Ch. 66.

"Otherwise than as agent."

Where, on the facts, the married woman must be taken as having contracted as agent for her husband, this s. has no application: *Paquin, Ltd.* v. *Holden*, 21 T. L. R. 361.

SS. 1, 2.

Effect of s.

This s., replacing subss. (3) and (4) of s. 1 of the M. W. P. A., does away with the rule laid down in *Palliser* v. *Gurney* and other cases cited in the notes on s. 1 (2) of the M. W. P. A., that, to be liable on a contract, a married woman must, at its date, have had separate property which she was not restrained from anticipating. It also does away with the anomalous result of the decisions in *Jay* v. *Robinson*, 25 Q. B. D. 467, and *Pelton Brothers* v. *Harrison*, 1891, 2 Q. B. 422, that a liability incurred during one coverture could be enforced during a subsequent coverture, but not during the intermediate discoverture.

Effect of proviso.

The effect of the proviso is that separate property subject to a restraint against anticipation is protected, even when judgment is recovered against the married woman after cessation of the coverture: *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28. For the form of judgment upon a contract made after this Act, see *Barnett* v. *Howard*, *sup.*

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

"Now . . . instituted."

"Now . . . instituted": the s. is retrospective; and applies to costs of proceedings instituted before the Act: *Re Godfrey*, 72 L. T. 8; 43 W. R. 244.

"Instituted by": the s. applies to an action or counterclaim by a married woman: *Hood Barrs* v. *Cathcart*, 1895, 1 Q. B. 873; and to *any* proceeding in such action, *e.g.* an appeal, or an application for a new trial: *Dresel* v. *Ellis*, 1905, 1 K. B. 574; and to a notice of claim leading to interpleader proceedings: *Nunn & Co.* v. *Tyson*, 1901, 2 K. B. 487; and to a summons for leave to intervene in a pending probate action: *Crickitt* v. *C.*, 1902, P. 177; but not to steps—*e.g.* appeals, motions, or petitions—taken by her in proceedings initiated by another: *Hood Barrs* v. *Cathcart*, 1894, 3 Ch. 376; *Hood Barrs* v. *Heriot*, 1897, A. C. 177; *Hollington* v. *Dear*, 39 Sol. J. 284; *Gordon* v. *G.*, 1904, P. 163; nor to a probate action to meet a caveat entered by her: *Moran* v. *Place*, 1896, P. 214; and see *Salter* v. *S.*, *ib.* 291.

The onus is on the married woman to show why an order should not be made: *Pawley* v. *P.*, 1905, 1 Ch. 593.

It does not enable an order for costs, made before the Act came into operation, to be altered or varied, or a new order for the same costs to be made: *Re Lumley*, 1894, 3 Ch. 135, 144.

For the form of order under this s., see Seton, 6th ed., 886.

Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

This s. does away with the effect of *Re Price*, 28 Ch. D. 709, cited in the notes to M. W. P. A., s. 1 (1). It applies to wills, made before the Act, of women dying after it: *Re Wylie*, 1895, 2 Ch. 116.

The section of the Wills Act referred to is:—

24. And be it further enacted, that every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.

Repeal.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Short title.

5. This Act may be cited as the Married Women's Property Act, 1893.

Extent.

6. This Act shall not apply to Scotland.

PART V.

SETTLED LAND ACTS.

CHAPTER I.

THE SETTLED LAND ACTS, 1882 TO 1890.

SUMMARY OF THE ACTS.

General purpose of Act of 1882.

THE general purpose of the Settled Land Act, 1882, is to give to an owner for the time being, having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the *corpus* of the property for the benefit of the successors in title of the owner.

Commencement, extent, definitions.

Part I. of the Act provides that the Act is to commence after 1882, and is not to apply to Scotland. Part II. gives a definition (extended by the S. L. A., 1890, s. 4) of the word "settlement," which is to include past as well as future settlements, and of the words "settled land," which includes not only the fee simple when the fee simple is the subject-matter of settlement, but any estate or interest in land which is the subject of a settlement: s. 2 (3). The Courts have discovered that the usefulness of the Act can be extended by treating two or more instruments as creating a compound settlement, see n. to s. 2 (1).

The scheme of the Act is first to give all the necessary powers to a tenant for life under a settlement, tenancy for life being the most usual form of limited ownership, and then, by s. 58, the powers so given are extended to other forms of limited ownership which are generally considered to place a person in the position of a landowner; ss. 60–62 provide for the special cases where the limited owner is an infant, a married woman, or a lunatic. Powers to whom given.

The powers of the Act are conferred on a tenant for life "beneficially entitled to possession" of the land: s. 2 (5); and "possession" includes receipt of income or rents and profits, so that a tenant's lease does not prevent a tenant for life from being in possession within the meaning of the Act: s. 2 (10) (i). The Act (s. 63) contains separate provisions for the case of a tenant for life not entitled to rents and profits as such, but still entitled under a settlement by way of trust for sale to the income of the land until sold, as representing the income to be derived from the proceeds of sale. By the S. L. A., 1884, s. 7, an order of the Court is required to enable the exercise of the powers conferred by s. 63, and naming the person to exercise those powers. Until an order is made the trustees continue competent to sell under their trust. The statutory powers are now frequently given to persons holding land on trust for sale, so as to avoid the necessity for obtaining this order.

The working of the Act rests entirely with the tenant for life. The trustees of the settlement for the purposes of the Act, except when acting for an incapacitated tenant for life, have no powers except to consent to sale of the mansion house (s. 15; repealed, and, with some alterations, re-enacted by S. L. A., 1890, s. 10), and are, as a rule, mere depositaries of money. They may, however, interfere in certain cases, *e.g.* on an interim investment of capital money.

Where resort to the Court is necessary, as must occasionally happen, the Court prescribed is the High Court of Justice (s. 2 (10) (ix.)), Chancery Division (s. 46), but jurisdiction is also given to County Courts (s. 46 (10)) in Resort to the Court.

the case of land, money, investments, or chattels not exceeding £500 in capital value, or, in the case of land, not exceeding £30 in annual rateable value.

Nature of powers.

The powers conferred by the Acts, with those conferred by s. 44 of the C. A., include all powers formerly inserted in settlements of real estate, and also many additional special powers; but, unlike the powers formerly conferred by settlements for dealing with the *corpus* of an estate, the powers conferred by the Acts can, except as to sale of the mansion house, to which a consent is required (S. L. A., 1890, s. 10), be exercised by the tenant for life, or other person in the same position as a tenant for life, at his own discretion, thus obviating the necessity for obtaining the concurrence or consent of trustees. Where there is no competent person holding the position of a tenant for life, then the powers of the Act are exercisable by trustees, and it is nearly always possible to obtain the appointment of trustees by making an application to the Court for the purpose: s. 38.

Preservation of capital.

To secure preservation of the capital money arising on a sale or otherwise, the tenant for life has a choice (s. 22) to procure the money to be paid either to trustees or into Court; but neither these trustees nor the Court have, as a rule, any voice in the mode or terms of the sale; they are only called into action after the sale is effected, and then only for the purpose of acting as depositaries of the proceeds of sale until applied in a manner authorized by the Act. Where there are trustees of the settlement, or compound settlement, or where trustees can be procured to act for the purpose of receiving capital money, resort to the Court is not necessary. If there be trustees of the settlement who refuse to receive capital money, the Court can appoint other trustees for the purposes of the Act (s. 38), so that, unless specially desired, payment into Court of capital money can generally be avoided: but in every case, unless otherwise provided in the settlement, and except in cases of leases not exceeding twenty-one years (see S. L. A., 1890, s. 7), there must be at least two trustees, either

appointed by the settlement or otherwise, or one trustee only if the settlement so permits, upon whom notice is to be served (s. 45), but the trustees may by writing under hand waive notice (S. L. A., 1884, s. 5 (3)). The existence of these two trustees, or a sole trustee where permitted by the settlement (though they or he may be wholly passive), is necessary before the tenant for life can properly make any disposition (except such a lease) under the Act. As no trustee of the settlement incurs any personal responsibility, except for the safe custody, and in some cases the proper investment and application, of money which he actually receives (s. 42), there can in general be no difficulty in procuring persons to act.

Re-investment.

The same principle applies to the application, on a re-investment or otherwise, of money in hand representing capital. Where land is purchased in good faith, the trustees have no voice in making the purchase. They are bound to pay the purchase-money or to make an investment by direction of the tenant for life (s. 22 (2)), and are not in any way responsible for the propriety of the purchase, provided it appears to be within the terms of the Act or the settlement (s. 42). Where capital money is to be applied for improvements authorized by the Act, the application may be either with the consent of the trustees or of the Court (s. 26), and where the consent of the trustees is required they are freed from responsibility by a certificate of the Land Commissioners (now the Board of Agriculture and Fisheries), or of a competent engineer or able practical surveyor duly appointed, or by an order of the Court (s. 26 (2)), so that the responsibility of trustees is confined to seeing that any given transaction appears on the face of it to be a transaction authorized by the Acts or that an interim investment is proper. They are free from all liability in respect to the propriety of the transaction, except where they approve a scheme for the execution of improvements under s. 26, on which, as a matter of course, they would obtain proper professional advice, and thereby practically free themselves from liability.

What powers given.

The particular powers conferred by the Act are as follows:—

Part III. of the Act, supplemented by S. L. A., 1890, ss. 5, 6, 10, 12, enables dispositions of land by Sale, Enfranchisement, Exchange or Partition. Part IV., supplemented by S. L. A., 1889, S. L. A., 1890, ss. 7, 8, 9, enables the grant of various leases for agricultural, mining, and building purposes, of the kinds usually authorized by settlements, and also enables other grants in the nature of leases to be made with the consent of the Court. Part V., supplemented by S. L. A., 1890, ss. 10, 12, contains general provisions applicable to any of these modes of disposition and to the case of a settlement of an undivided share of land; but s. 10 of S. L. A., 1890, requires any sale, exchange, or lease of the principal mansion house and its pleasure grounds, and park, and lands usually held therewith to be made with the consent of the trustees of the settlement or the Court.

Application of capital.

Part VI. provides for the application of capital money when the object is to re-invest it in land or securities (s. 21), and the application must be made by the direction of the tenant for life, or in the absence of such direction, by the trustees, subject to any consent required by the settlement (s. 22 (2)). The power to re-invest includes application in payment of incumbrances, redemption of land-tax and quit-rents, purchase of tithe rent-charge, and interim investment, and in the case of interim investment includes investments which trustees are authorized by law to make. Besides the modes of investment specified in the Act any other investment authorized by the settlement may be made (s. 21 (xi.)). An investment in land out of England or Wales cannot be made with money arising from sale of land in England or Wales unless expressly authorized by the settlement (s. 23).

Improvements.

Part VII., taken with s. 21 (iii.), and S. L. A., 1890, s. 15, provides for the application of capital money in effecting improvements on the unsold portion of an

estate. The list of improvements authorized is very large, and has been extended by S. L. A., 1890, s. 13, and the Housing of Working Classes Act, 1890, s. 74, (1), and seems to include all improvements more or less permanent (including the rebuilding—with a limit as to cost—of a mansion house), which a prudent owner would wish to effect. By s. 30 the improvements to which the Improvement of Land Act, 1864, applies are extended so as to include all improvements mentioned in this Act, thereby enabling money to be borrowed under that Act, for all the improvements specified in this Act. The mode of procedure under the Act of 1864 is also simplified (s. 64 and schedule). Some kinds of improvement, as laying down to permanent pasture, were omitted on the ground that when made they would be liable to immediate re-conversion into income, but are now included by the Agricultural Holdings Act, 1900. By s. 28 the tenant for life may be put under an obligation to maintain and keep in repair improvements. There may sometimes be no one inclined to enforce the obligation, but the representative of the tenant for life would after his death be liable for the neglect.

Contracts.

Part VIII. enables the tenant for life by contract to bind his successor in respect to all dealings capable of being effected under the Act, so that where time is required to complete a transaction, as in case of an agreement to grant building leases, the person dealing with the tenant for life is made as safe by a mere contract as if he were dealing with an owner in fee simple; see also S. L. A., 1890, s. 6.

Other capital money.

Part IX. contains provisions as to special cases of money representing capital, namely, money in Court (see also S. L. A., 1890, s. 14), or in the hands of trustees arising from dealings otherwise than under this Act; money arising from sales of reversions, or limited interests, or from sale of timber; money required for protection of the estate by legal proceedings; and money arising by sale of heirlooms, the sale of which is enabled by the Act (s. 37).

Duties, &c., of trustees.

Part X. deals with the duties and liabilities of trustees. The protection afforded to a trustee is very full. His active duties are—to consent to a sale of a mansion house and its grounds (S. L. A., 1890, s. 10), to approve a scheme for improvements (s. 26), to receive or pay money, and by direction of the tenant for life (s. 22 (2)) to make interim or other investments. He is not bound to take proceedings in reference to any dealing of which notice is given to him. He is safe in acting as regards the execution of a scheme on a certificate of the Board of Agriculture and Fisheries, or of a competent engineer, or able practical surveyor duly appointed, or on an order of the Court (s. 26 (2)); he is also safe in giving any consent or in omitting to do anything he might do, and in adopting any contract under the Act made by a tenant for life for purchase, enfranchisement, exchange, partition, or lease, and in accepting any conveyance which appears correct on the face of it, and in paying by direction of the tenant for life any money which appears to be paid in accordance with the Act (s. 42), or which, in the case of an improvement, is authorized by the proper certificate or by order of Court. Under S. L. A., 1890, s. 12, on a sale to, or purchase by, the tenant for life or an exchange or partition with him, affecting settled land, the trustees take his place in carrying the transaction into effect.

Procedure.

Part XI. deals with procedure before the Court, to which applications may be made either by petition, or by summons, and the Court is enabled to direct payment of costs and expenses, and the raising of the amount out of the settled land.

Powers not capable of restriction.

The general effect of Part XII. is that the powers of the Act are personal to the tenant for life under the settlement, and when once they have attached they are indestructible. He cannot contract himself out of the Act, nor can he transfer his powers to any one else, but he cannot exercise them so as to defeat a purchaser or mortgagee of his life estate, except that, as against his own assignee, his powers of leasing at the best rent

without fine continue so long as he remains in possession. Nor (s. 51) can the settlor insert in the settlement any provisions tending to prevent a tenant for life from exercising the powers conferred by the Act. But though the settlor cannot restrict, he may (s. 57) enlarge these powers. He may, for instance, make unnecessary the notice to trustees of any intended dealing, or extend the powers of leasing, or the purposes for which capital money may be applied. All additional powers take effect as if conferred by the Act, so that there is only one uniform mode of exercising settlement powers.

To whom powers given.

Part XIII. specifies the several persons who, as well as tenants for life, are to have the powers given by the Act to a tenant for life, and it may be said generally that all owners of an estate less than the fee simple are here included, except a dowress and a lessee at a rent, including even tenants in tail who by Act of Parliament are precluded from barring their estates tail, but except tenants in tail of estates purchased with money granted for the purpose by Parliament.

Disabilities.

Part XIV. provides for the case of limited owners under the disability of infancy, coverture, or lunacy. Part XV. provides for the case of settlements by way of trust for sale where the tenant for life is entitled to the income of the proceeds of sale, and not to the possession or income of the land as such. But the powers given by that Part to a tenant for life are not to be exercised without the leave of the Court under the Settled Land Act, 1884. Part XVI. deals with repeals, and Part XVII. with the application of the Act to Ireland.

Act of 1887.

The Settled Land Act, 1887, enables capital money to be applied in re-purchasing a terminable or perpetual rent-charge created under any Act of Parliament in order to raise money for executing improvements authorized by s. 25 of the Act of 1882.

Acts of 1889 and 1890.

The Settled Land Act, 1889, enables an option of

purchase to be given in a building lease; and that of 1890 supplements the earlier Acts in various ways.

General result. From this short sketch of the contents of the five Acts, it will be seen that, except in the particular cases of estates purchased with a Parliamentary grant of money, and of the sale, exchange or lease of the principal mansion house and its pleasure grounds and park and lands, to which the consent of the trustees of the settlement or of the Court is required, every space of land in England, Wales, and Ireland, to the income of which any person in his private capacity is entitled as beneficial owner, may now at his sole will be sold or otherwise dealt with by him in nearly every mode in which a prudent owner would wish to deal, except that he cannot appropriate to his own use money representing capital. The number of cases in which there is no person presently entitled beneficially in possession, and therefore no person to sell (*e.g.* in the case of a discretionary trust), will be very few. These cases could, in the main, be met by enacting that where there is no person who has the statutory powers, the trustee of the settlement may exercise them. Also, under the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), the incumbent of any benefice can procure a sale of any glebe, and investment of the proceeds in the name of the Ecclesiastical Commissioners. Further, under the Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), Universities and Colleges within the Acts of 1858 to 1880 are given the powers of sale and many other powers of a tenant for life, subject, in most cases, to the consent of the Board of Agriculture and Fisheries, which stands in the place of trustees of the settlement. The question remains whether provision should not be made for effecting within a given time a sale of the land of all public, ecclesiastical, and charitable corporations, and of all trustees for charitable purposes (by means of whose ownership a large amount of land is held on what are in fact trusts in perpetuity), only so much being retained as may be necessary for the purposes of the particular

institution, as the site of a parsonage, hospital or school. This principle is adopted in the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73, s. 5), as to land devised upon charitable trusts, and would be merely a return to the ancient, rigorous, and right policy of the law against the "dead hand."

CHAPTER II.

THE SETTLED LAND ACT, 1882.
45 & 46 VICT. c. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

Objects of Act.

See the remarks, as to the objects of the Act, of Baggallay, L.J., in *Re Jones*, 26 Ch. D. 736, 738; of Chitty, J., in *Re Duke of Marlborough's Settlement*, 30 *ib.* 127, 131; *Clarke* v. *Thornton*, 35 *ib.* 307, 311; of Halsbury, L.C., in *Bruce* v. *Marquis of Ailesbury*, 1892, A. C. 356, 361, and of Lindley, M.R., in *Re Gladstone*, 1900, 2 Ch. 101, 105; the Court will consider the welfare of the estate, the tenants, and labourers: *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 548; see also *Re Wythes*, 1893, 2 Ch. 369, 374; *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 345, 355; *Re Mundy & Roper*, 1899, 1 Ch. 275.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

S. 1.

I.—PRELIMINARY.

PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

II.—DEFINITIONS.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

S. L. A., 1890, s. 4.

This subs. must be read with s. 4 of S. L. A., 1890; it is extended by s. 58 (2), *inf.*

"Act of Parliament" includes a public as well as a private Act: *Vine* v. *Raleigh*, 1896, 1 Ch. 37.

Ecclesiastical property.

A limitation to A. and his successors, vicars of a parish, is not a settlement within this subs.: *Ex p. Vicar of Castle Bytham*, 1895, 1 Ch. 348; and the Act does not apply to ecclesiastical property at all: S. C., and *Re Bishop of Bath and Wells*, 1899, 2 Ch. 138; but see n. to s. 32, *inf.*

Compound settlement.

"Or any number of instruments." Where the settlement consists of more than one instrument it is frequently called a compound settlement. With reference to compound settlements the following propositions seem to be deducible from the cases:—

Tenant for life may act under a compound or single settlement.

1. There may be at the same time, for the purposes of the Acts, a more comprehensive settlement consisting of several documents, and a less comprehensive settlement constituted by one only of them: *Re Du Cane & Nettlefold*, 1898, 2 Ch. 96; *Re Mundy & Roper*, 1899, 1 Ch. 275; *Re Lord Wimborne & Browne*, 1904, 1 Ch. 537. The powers conferred by the Acts are capable of being exercised under any instrument which is a settlement, provided that there is under that instrument a tenant for life or a person having his powers (which for this purpose includes a person whose life estate has been extinguished: *Re Mundy & Roper, sup.*; *Re Lord Wimborne & Browne, sup.*; as the powers annexed to it are incapable of being extinguished, see s. 50 (1)) and trustees for the purposes of the Acts; and an assignment or derivative settlement by a remainderman of his estate may be disregarded: *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Knowles' S. E.*, 27 Ch. D. 707. As to what estates, &c., are overreached by an exercise of the powers of the Acts, see n. to s. 20, *inf.*, and cases there cited.

Surrender of life estate does not affect the powers.

Disposition of remainderman immaterial.

S. 2.

DEFINITIONS.

Effect of restoration of life estate.

Query the decision in *Re Cornwallis-West & Munro.*

2. If land is limited by settlement No. 1 to A. for life with remainder subject to family charges to B. in tail, and A. & B. disentail and resettle to A. for life, by way of restoration of his life estate under settlement No. 1, with remainder to B. for life, &c., A. is in of his old estate, and is tenant for life under settlement No. 1, and also under the compound settlement, but has been held not to be tenant for life under settlement No. 2: *Re Cornwallis-West & Munro*, 1903, 2 Ch. 150, as explained by *Re Lord Wimborne & Browne, sup.*, though this seems to put a narrow construction on subs. 5. A. can sell under the Acts if there are trustees either of settlement No. 1, or of the compound settlement. As to restoring the old life estate, see *Re Wright's Trustees & Marshall*, 28 Ch. D. 93. It should not be restored if there are no powers given by the original settlement which it is necessary or desirable to preserve. If it is restored the provision mentioned in Key & Elphinstone, 8th ed., vol. ii. 669 (c), should be added.

Provision to be used when life estate restored.

Effect of non-restoration of life estate.

3. If in a case similar to the above A.'s life estate is not restored, he is tenant for life under settlement No. 2, and also under the compound settlement, but not under settlement No. 1, but he can exercise the powers of a tenant for life under No. 1, as by s. 50 (1), *inf.*, those powers are incapable of being extinguished: *Re Mundy & Roper, sup.*; *Re Lord Wimborne & Browne, sup.* Consequently A. can sell under the Acts if there are trustees of either settlement No. 1, or the compound settlement, or settlement No. 2; but his conveyance as tenant for life of settlement No. 2 will not override family charges subsisting under settlement No. 1.

Family charges under prior settlement can be overreached by appointment of trustees of compound settlement.

4. If at any time there are subsisting family charges under any instrument or instruments, and there is a tenant for life under a later instrument, trustees can be appointed of the compound settlement constituted by all the instruments under which the land stands limited, so as to enable the tenant for life to override the family charges: *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 345 (approved by C. A. in *Re Mundy & Roper, sup.*); *Re Spencer's S. E.*, 1903, 1 Ch. 75; *Re Phillimore's Estate*, 1904, 2 Ch. 460. With the exception mentioned below, this appears to be the only case in which it is *necessary* to have trustees appointed of a compound settlement, if the persons entitled to the family charges will not or cannot concur, but appointments may be and frequently are made of trustees of a compound settlement, though at the time trustees of the first settlement would be sufficient; see *Re Tibbits' S. E.*, 1897, 2 Ch. 149; *Re Mundy & Roper, sup.*; *Re Cornwallis-West & Munro, sup.* It is submitted that in *Re Lord Stafford's Settlement & Will*, 1904, 2 Ch. 72 (see n. to s. 37, *inf.*), the trustees of the settlement of 1874 and not the trustees of the will were the proper persons to receive the purchase money of the heirlooms bequeathed by the will, and that it was unnecessary for trustees to be appointed of the compound settlement of the heirlooms and of the proceeds of the sale thereof created by the settlement and the will.

Query the decision in *Re Lord Stafford.*

It was held unnecessary to appoint trustees of a compound settlement in *Re Keck & Hart*, 1898, 1 Ch. 617, where deeds had been executed charging jointures under a power in the original settlement; *Re Du Cane & Nettlefold, sup.*, where the tenant for life had assigned his life estate by way of family arrangement within the meaning of S. L. A., 1890, s. 4.; *Re Lord Wimborne & Browne, sup.* The exception above referred to is the case of a base fee which is dealt with under s. 58 (1.) (iii.), *inf.*

Base fee.

5. Trustees of a compound settlement must generally be appointed by the Court under s. 38. A declaration in a settlement that the trustees thereof should be trustees of the compound settlement made by that settlement and any *prior* instruments is ineffectual: *Re Spencer's S. E., sup.*; as to *subsequent* instruments, see Key & Elphinstone, 8th ed., vol. ii. 661 (f).

Mode of appointment of trustees of compound settlement.

6. A tenant in tail in possession (s. 58) is a person having the powers of a tenant for life, and when once the estate is in possession he cannot extinguish those powers: s. 50 (1). Where A. the tenant for life and B. the tenant in tail disentail, reserve a joint power of appointment, and relimit the old uses by way of restoration, there is no doubt that when B. becomes entitled in possession he has the powers of a tenant for life under the settlement, and that it is unnecessary to appoint trustees of the compound settlement created by the settlement and disentailing assurance, see *sup.* But where A. and B. resettle to A. for life with remainder to B. for life in restoration *pro tanto* of his estate under settlement No. 1, it has not yet been decided whether B. when in possession can sell under settlement No. 1 and so overreach charges thereby created without trustees being appointed of the compound settlement; it is submitted that he can.

Tenant in tail; restoration of estate when in remainder.

Where an estate tail in remainder is barred, with the consent of the protector, and converted into a fee simple before it falls into possession, the statutory powers never attach.

Estate tail in remainder enlarged to fee simple.

Where land is settled by reference to the limitations of an existing settlement, the two settlements constitute one settlement within this subs., and capital money under the first settlement can be applied to pay charges on land comprised in the settlement made by reference, and *vice versâ*: *Re Mundy's S. E.*, 1891, 1 Ch. 399; *Re Lord Monson's S. E.*, 1898, 1 Ch. 427; and compare *Re Lord Stamford's S. E.*, 43 Ch. D. 84; *Re Eyre Coote*, W. N., 1899, 222. But the appointment of trustees of one settlement would hardly constitute them trustees of the other settlement, though of course, on a purchase with capital money, it is not necessary to appoint trustees of a mere conveyance to the uses of a settlement. In the case of a settlement by reference it is best to provide that the S. L. A. trustees of the settlement referred to, shall be the trustees thereof.

Settlement by reference.

The principle in *Re Mundy's S. E., sup.*, that where the limitations are identical for the purpose in hand the instruments constitute one settlement, was applied in *Re Byng's S. E.*, 1892, 2 Ch. 219, where the second settlement was not by reference to the first, and the powers of the two settlements were not identical; and in *Re Lord Stafford's*

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Settlement and Will, 1904, 2 Ch. 72, where the land comprised in the settlement, and the heirlooms bequeathed by the will were treated as if settled by the same document.

Unfortunately the expression compound settlement is used in the last-mentioned cases as well as in the cases referred to in the n. *sup.* "Compound Settlement;" but it seemed to follow from *Re Mundy's S. E.*, and *Re Lord Stafford's Settlement & Will, sup.*, that in cases of that class it was not necessary that the trustees of the several instruments should be the same or that there should be trustees of the so-called compound settlement. Kekewich, J., has however decided that the appointment of trustees of the so-called compound settlement is necessary in all such cases: *Re Coull's S. E.*, 1905, 1 Ch. 712. It is submitted that this decision is not supported by the authorities referred to in it. In Lord Stafford's case (following an unreported

Qu. the decision in *Re Coull's S.E.*

CORRIGENDUM

(*Page* 328, *line* 14).

Instead of "(following an unreported decision of Byrne, J.)," *read* "(see the unreported decision of Byrne, J., mentioned 1904, 2 Ch. 74)."

Estate, 27 L. R., Ir. 364.

Equitable settlement.

The settlement need not be a legal settlement perfected by transfer of the legal estate. "Agreement" and "covenant to surrender" are expressly mentioned in s. 2 (1), and these bind the equitable "interest in" the land, s. 2 (3).

"By way of succession."

As to the force of the words "by way of succession," see *Re Mundy & Roper*, 1899, 1 Ch. 275, 290, 297; *Re Lord Wimborne & Browne*, 1904, 1 Ch. 537, 541; and the cases on the Finance Act, 1894, of *A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *A.-G.* v. *Clarkson*, 1900, 1 Q. B. 156; *Re Campbell*, 1902, 1 K. B. 113, 119, 121–123. A settlement within the meaning of the Act is created by a conveyance to the use of A. for life with remainder to secure a jointure or portions, with remainder to A. in fee: *Re Phillimore*, 1904, 2 Ch. 460, 463. If on A.'s death the charges still subsist, the land still stands limited to persons by way of succession under the original settlement (see *Re Lord Wimborne & Browne, sup.*, at p. 541), and if A. devises his remainder in fee to B. for life, he is tenant for life of the compound settlement constituted by the original settlement and the will: *Re Phillimore, sup.*

A gift in fee to a married woman, with restraint on anticipation, is no limitation "by way of succession": *Bates* v. *Kesterton*, 1896, 1 Ch. 159; but a limitation in trust for a married woman for her life without power of anticipation, and after her death to such uses as she should by will appoint, and in default, to the use of herself in fee, gives her the powers of a tenant for life under s. 58 (1) (ix.), *inf.*: *Re Pocock & Prankerd*, 1896, 1 Ch. 305.

Alternative gifts.

An alternative limitation in fee creates an estate by way of succession (s. 58 (1) (ii.)), but a devise in fee to trustees on trust for persons not ascertained, and taking only on a future event, would not: *Re Burdin*, 28 L. J. (Ch.) 840; and compare *Re Horne's S. E.*, 39 Ch. D. 84, at least where the devise carries the whole beneficial interest (see *Genery* v. *Fitzgerald*, Jac. 468, 1 Jarman on Wills, 5th ed., 615). Where the intermediate estate (as under a devise to A. in fee simple on the death of B.) descends, the case would be within this subs. taken along with s. 58 (1) (ii.); and see *Re Atherton*, W. N. 1891, 85; *Williams* v. *Jenkins*, 1893, 1 Ch. 700, 702.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

An instance where this s. applies is a devise to A. for life, there being either no devise of the remainder in fee, or there being a devise which lapses. This remainder is made an estate coming to the heir by virtue of the settlement. The settlement, therefore, creates a succession.

Qu. whether there is a settlement in the case where a testator devises to A. for life, with no devise over, and dies without an heir, but see *Re Bond*, 1901, 1 Ch. 15.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

"Land."

For the meaning of "Land" in Acts of Parliament passed since 1850, see note to V. and P. A., s. 1, also subs. 10 (i), *inf.* Leaseholds and copyholds, as well as freeholds, are included under the word land (compare *Wilson* v. *Eden*, 16 Beav. 153). By subs. 1 the settlement comprises the instrument or instruments under which land (*i.e.* fee simple, copyhold or leasehold) or any estate or interest in land (*i.e.* in fee simple, copyhold, or leasehold) is settled, and by this subs. land (*i.e.* the fee simple, the customary estate, or the term in land as the case may

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"Settled land."

be), and any estate or interest (in the fee simple, customary, or leasehold estate) *which is the subject* of the settlement is referred to in the Act as the settled land. Only that estate which is the subject of the settlement is included under the term "settled land." Therefore a power given to lease the settled land is a power to lease the interest settled. In the case of settled leaseholds, for instance, it does not enable a lease to be made binding on the reversioner in fee, nor in the case of copyholds, a lease contrary to the custom, nor in the case of an equity of redemption (that is, a settlement of land subject to a mortgage) does it enable a lease to be made binding on the mortgagee further than the original mortgagor could either under the C. A., s. 18, or otherwise have bound such mortgagee. In all cases "the settled land" means the fee simple, if that is settled; it means the equity of redemption, if that is settled; it means the customary estate, if copyholds are settled; and the estate for a term of years or lives, if leaseholds for years or lives are settled. The powers conferred by the Act only bind persons deriving title under the settlement, and not any person having a title paramount to the settlement. This is plainly seen on considering the force given to a conveyance by s. 20, *inf.*

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

See on this subs., *Re Marquis of Ailesbury and Lord Iveagh*, 1893, 2 Ch. 345, 354–6; *Re Bective Estate*, 27 L. R. Ir. 364, 369.

Duration of "settlement." and of S.L.A. powers.

The duration of the powers of an ordinary settlement is a question of intention. Usually they cease when the estate comes to be vested absolutely in some person who is *sui juris*: *Re Lord Sudeley & Baines & Co.*, 1894, 1 Ch. 334, 339; *Re Jump*, 1903, 1 Ch. 129. The S. L. A. powers, if the fee simple comes to an infant, are exercisable, either under this subs. (for the origin and history of which see *Re Marquis of Ailesbury and Lord Iveagh, sup.*), or under s. 59; if this subs. applies, it is conceived that their exercise would have effect, under s. 20 (2), *inf.*, as to charges prior to the infant's estate, subsisting under the settlement creating that estate. Sec. 59 expressly says that an infant is to be deemed tenant for life of land to which he is entitled in possession; consequently he has the powers of a tenant for life. As to the duration of powers once vested by the Act in a tenant for life or person having the powers of a tenant for life, see s. 50, *inf.*, and n. thereto.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

See this subs. discussed in *Re Baroness Llanover's Will*, 1903, 2 Ch. 16.

Where under a will there was a trust to accumulate rents during a son's life, and after his death a trust for his children, and the trust for accumulation ran out under the Thellusson Act, and the son, as heir-at-law, came in, he was held to be, or to have the powers of, a tenant for life: *Re Atherton*, W. N., 1891, 85: and see *Vine* v. *Raleigh*, 1896, 1 Ch. 37, where there was a resulting trust, under similar circumstances, for next of kin; and it was held that the living next of kin, and the executrixes of a dead one, had the powers of a tenant for life under s. 58 (1) (v.): the judge giving his opinion—but not actually deciding—that the executrixes, and not the persons entitled to the estate of the dead next of kin, were "beneficially entitled" within this subs.

Tenant for life, legal or equitable.

This definition taken in connexion with subs. 10 (i.) and ss. 58 (1) (vi.) (viii.) (ix.) and 61 (2) (3) includes all equitable tenants for life (not being infants or of unsound mind), whether of the entirety or of an undivided share, and whether they are entitled or not to be let into possession, and the effect of the Act is that a mere equitable tenant for life, being adult and of sound mind, can convey the legal estate vested under the settlement, in a trustee, that estate being the subject of the settlement (see s. 2 (3): see also note to s. 20). The case of an infant is provided for by ss. 59 and 60, and that of a lunatic, so found by inquisition, by s. 62.

"Under a settlement."

An assignee of the tenant for life is not so entitled "under a settlement," but the tenant for life is; and where the tenant for life, before coming into possession, has assigned his reversionary life interest out and out, he can under s. 50, with the consent of the assignee, exercise the powers of the Act on the life estate coming into possession.

Equitable tenant for life when entitled to possession.

The Court has discretion to let an equitable tenant for life into possession of the land and title deeds, but the trustees and estate must be protected; as to the effect of the S. L. A.'s upon this discretion, see *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297; *Re Hunt*, W. N., 1900, 65, *ib.*, 1901, 144; *Re Wilkinson*, 85 L. T. 43; and compare *Re Richardson*, 1900, 2 Ch. 778 (tenant for life subject to term for paying off incumbrances); *Re Money Kyrle's Settlement*, *ib.*, 839 (a similar case).

What is "possession."

"Entitled to possession" means that the right is immediate and not in reversion or expectancy: *Re Jones*, 26 Ch. D. 741, *per* Baggallay, L.J.; *Re Clitheroe*, 28 *ib.* 378, affirmed 31 *ib.* 135; *Re Martyn*, 69 L. J., Ch. 733. The possession need not be personal, but may be the possession of trustees paying surplus rents and profits to a beneficial owner: *Re Morgan*, 24 Ch. D. 114; *Re Jones* and *Re Clitheroe*, *sup.* (and see as to executors, *Vine* v. *Raleigh*, 1896, 1 Ch. 37, 41), but the interest of the tenant for life must be in possession, and not an interest to arise in him at a future day if then living under a conveyance then to be made: *Re Strangways*, 34 Ch. D. 423. But where he would be entitled to surplus rents (if any) it is immaterial that there are none:

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Re Jones, sup. See also *Re Atkinson*, 30 Ch. D. 605, 612; affirmed 31 *ib.* 577; *Re Hale and Clark*, 34 W. R. 624; W. N., 1886, 65. A person who has a right to occupy rent free during his life is a tenant for life: *Re Eastman's S. E.*, W. N., 1898, 170, 68 L. J., Ch. 122; *Re Carne's S. E.*, 1899, 1 Ch. 324; *Re St. Donat's S. E.*, 79 L. T., 542; notwithstanding extensive powers of management in the trustees: *Re Baroness Llanover's Will, sup.*; but not a person who has a right to reside rent free "in any one of the testator's houses at X.": *Re Bond*, 48 Sol. J. 192.

"Beneficially" entitled.

In *Williams* v. *Jenkins*, 1893, 1 Ch. 704, a lady was declared to have the powers of a tenant for life whose life interest was not only suspended for purposes of an implied trust for accumulation to pay debts, but was also subject to her educating her children; and in *Re Theaker's S. E.*, 1898, T. No. 1250 (in Chambers, 8th August, 1898), a lady entitled to receive, during widowhood, the income of real estate "for her own use and benefit, and for the maintenance and education" of her children, was held to have the powers of a tenant for life, under s. 58 (1) (vi.)

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

Two or more.

The effect of this subs. is that all persons having concurrent interests for life (the words are "*so* entitled": see *Re Collinge's S. E.*, 36 Ch. D. 516, 518), *under the same settlement* must join. It would be improper in such a case to allow the tenant for life of one undivided moiety, to sell that moiety alone; he must join with the tenant for life of the other moiety in selling the whole, but cannot be compelled to join: *Camden* v. *Murray*, 16 Ch. D. 161. But if each undivided moiety is settled separately, whether by the same or by two different instruments, then neither moiety is the subject of the settlement made of the other moiety; each moiety is in itself settled land, and can be sold by the tenant for life thereof without the concurrence of the owner of the other: subss. 3 and 10 (i.); *Williams* v. *Jenkins*, W. N. 1894, 176; *Cooper* v. *Belsey*, 1899, 1 Ch. 639; *Re Osborne & Bright*, 1902, 1 Ch. 335; and where land is settled in undivided shares, and one share has become vested in an owner in fee, while the other share is still the subject of a tenancy for life, the tenant for life of the settled share may sell that share without the concurrence of the owner in fee of the other share: *Cooper* v. *Belsey, sup.* (overruling *Re Collinge's S. E.*, 36 Ch. D. 516; 36 W. R. 264). See also as to undivided shares s. 19, *inf.*

A discretionary trust to pay rents during the life of A. to him or others does not constitute them together a tenant for life; *Re Atkinson*, 30 Ch. D. 605, affirmed 31 *ib.* 577; *Re Tessyman's S. E.*, 42 Sol. J. 96.

The persons together constituting the tenant for life may severally employ their own solicitors: *Smith* v. *Lancaster*, 1894, 3 Ch. 439.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

Who has the powers.

The powers conferred by the Act are given to the person who, under the settlement, is in the position of beneficial owner for life, subject to all charges or incumbrances, whether that ownership produces any fruit or not (see note to subs. 5 above). As to the extent to which the tenant for life's powers are affected by incumbrances on his life estate, see s. 50 *inf.*, and S. L. A., 1890, s. 4 and notes thereto.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

Trustees of the settlement. S.L.A., 1890, s. 16.

This subs. must be read with s. 16 of S. L. A., 1890, which meets the case of a power or trust arising only at a future time (see *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Horne's S. E.*, 39 Ch. D. 84) and of a power or trust extending only to the other land comprised in the same limitations. The power may be a power exercisable only with consent of the tenant for life: *Constable* v. *C.*, 32 Ch. D. 233; but it has been decided in Ireland that where the power was exercisable only with the consent of a stranger, whose consent was unobtainable, the trustees for sale were not trustees for the purposes of this Act: *Re Johnstone*, 17 L. R. Ir. 172. It is conceived, however, that this is a mere fetter on the original power, and as the tenant for life sells, the consent of strangers is not required. Those persons only are trustees for the purposes of the Act who either are appointed trustees or under the settlement have a power of sale (present or future), or of consent to or approval of the exercise of such a power, or have a trust for sale, as required by this subs. or s. 16 of S. L. A., 1890. No other trustees are trustees within the Acts: see *Re Carne's S. E.*, 1899, 1 Ch. 324. If there be no such trustees, or if there be, but they refuse to act, it is necessary to procure the appointment of trustees under s. 38.

Power of approval.

Where land was devised to A. for life with remainder to B. in tail and the will empowered the life tenant in actual possession to sell with

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the approval of the trustees of the will, and, after a disentail and re-settlement, A.'s life estate was extinguished, query whether on a sale by A. in exercise of his statutory power under the will, the trustees thereof were trustees for the purposes of the Act: *Re Lord Wimborne & Browne*, 1904, 1 Ch. 537.

Under settlements giving a present power of sale of the settled land, any sale, lease, &c., may be made in exercise either of the powers of the settlement (subject to s. 56, *inf.*) or of the powers of the Act. If the Act be resorted to, the trustees with the power of sale under the settlement, or trustees appointed under s. 38, are the trustees for the purposes of the Act.

If for any reason it is preferred to make any sale, &c., under the powers of the settlement and not under the Act, the money received and liable to be re-invested in land, may nevertheless be applied in the same manner as if it arose under the Act (s. 33).

Power must be general.

It is conceived that executors with power to sell for payment of debts are not, but that persons with a general power of sale (as in *Re Brown*, 32 Ch. D. 597) are, trustees within this s. The power must be general: *Re Coull's S. E.*, 1905, 1 Ch. 712, 724. But in *Re McCurdy's S. E.*, 27 L. R. Ir. 395, trustees of real and personal estate were directed, in the first instance, to pay the testator's debts; then to pay income to A. during widowhood; and, ultimately, to sell; so that under S. L. A., 1890, s. 16, they were S. L. A. trustees; that s. was not cited, but an order was made declaring A. tenant for life under s. 63, and the trustees to be S. L. A. trustees: see also note on s. 56, *inf.*

Power to sell restricted as to price.

The principle of *Wheelwright* v. *Walker* would not, it is conceived, apply to prevent persons who have only power to sell at or above a certain price being trustees for the purposes of the Act. They are persons having a power of sale, though only capable of being exercised on particular terms. They are intrusted to receive purchase-money, and as the tenant for life sells the limitation of price does not apply.

Power to sell for a rent.

Trustees having power to sell only in consideration of a rent are not trustees for the purposes of the Act. *Re Morgan*, 24 Ch. D. 114, 115.

Powers in future settlements.

In all settlements since the Act the proper course is expressly to appoint trustees for the purposes of the Act. It is unnecessary to insert powers similar to those contained in the Act. As to extending the powers of the Acts, see s. 57 and n. thereto.

Compound settlement.

Where two or more instruments together constitute a settlement, trustees of such settlement cannot be validly appointed by the *last* of such instruments: *Re Spencer's S. E.*, 1903, 1 Ch. 75; and see n. to subs. 1 *sup.*, "Compound Settlement."

Single trustee.

By s. 39 (2) the expression "the trustees of the settlement" is made applicable to the surviving or continuing trustees or trustee of the settlement for the time being, but this is subject to subs. 1 of that s., which prohibits payment of capital money to fewer than two persons as trustees, unless authorized by the settlement.

If it is intended to authorize the payment of capital money to a single trustee, as was usual in settlements before the Act, express authority should be given, but see n. to s. 39 (1).

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

What is capital money.

The following are capital moneys under the Act, and should be paid to the settlement trustees or into Court under s. 22 :—

(1.) Money received on sale (which includes enfranchisement) or for equality of partition or exchange, and on the exercise of an option for purchase given under S. L. A., 1889.

(2.) Fines on grants of leases under this Act (see S. L. A., 1884, s. 4), and fines on confirmation under this Act of leases, except fines on leases granted pursuant to a covenant for renewal (see note to s. 7 (2)).

(3.) Money raised by mortgage : ss. 5, 18, 24 (4); S. L. A., 1890, s. 11.

(4.) Share of mining rent (three-fourths where tenant for life is impeachable for waste in respect of the minerals leased, otherwise one-fourth) unless the settlement provides to the contrary : s. 11.

(5.) Three-fourths of proceeds of sale of timber cut under s. 35, where the tenant for life is impeachable for waste in respect of timber.

(6.) Valuation money for timber, underwood, fallow dressings, &c., on a sale of the land, though tenant for life be unimpeachable for waste: *Re Llewellin*, 37 Ch. D. 317. *Re Rosher*, W. N., 1899, 134.

(7.) Money paid for licences to demise granted to copyholders, except where the licence is authorized by the custom : s. 14.

(8.) Money paid for dedication of streets, &c., under s. 16.

(9.) Money paid into Court under the Land Clauses Consolidation and other Acts, or in the hands of trustees and liable to be invested in the purchase of land to be settled as the settled land : ss. 32, 33; but see n. to s. 21 (ix.), *inf.*

(10.) Money in Court so liable, though not paid in under any of those Acts: *Clarke* v. *Thornton*, 35 Ch. D. 307, 314.

(11.) Proceeds of sale of heirlooms : s. 37; but not damages payable by the representatives of a former tenant for life in respect of heirlooms : *Re Walton*, 44 Sol. J. 645.

(12.) Money paid for varying or rescinding contracts for sale, exchange, or partition : s. 30 (1) (ii.).

(13.) Damages recovered by a tenant for life from a lessee for breach of repairing covenants in a lease : *Mitchell* v. *Armstrong*, 17 T. L. R. 495.

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Money belonging to tenant for life.

The following it is conceived are not capital moneys, but belong to the tenant for life :—

(1.) Money paid by a lessee as a consideration for acceptance of surrender of a lease (see note to s. 13 (1)).

(2.) Fines on the grant of leases pursuant to a covenant for renewal (see note to s. 7 (2)).

(3.) Money paid to the tenant for life as consideration for varying the terms of a lease under s. 31 (1) (iii.), provided the payment be not in the nature of a premium for a lease.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

"Land."

Tithes.

Title of honour.

Rent-charge.

Personal annuity.

For a definition of "land" in Acts of Parliament passed since 1850, see note to V. & P. A. s. 1, *sup.* Tithes are "land" within this subs.: *Re Esdaile*, 54 L. T. 637; W. N., 1886, 47. Also a title of honour descendible to heirs general or heirs of the body: *Re Rivett-Carnac*, 30 Ch. D. 136, 139; considered in *Re Earl of Aylesford's S. E.*, 32 Ch. D. 162. So is a rent-charge: *Re Bective*, 27 L. R. Ir. 364, 367; *Re Brewer*, 1 Ch. D. 409.

As to a personal annuity limited to a man and his heirs, see *Re Rivett-Carnac's Will*, 30 Ch. D. at p. 141.

As to undivided shares, see notes to ss. 2 (6) and 19, and *Cooper* v. *Belsey*, there cited.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

"Rent": see *Lord Zouche* v. *Dalbiac*, L. R., 10 Ex. 172.

"Other reservation," *i.e.* in kind: see Co. Litt. 142a; *Rex* v. *Earl Pomfret*, 5 M. & S. 139, 143; *Re Moody & Yates*, 30 Ch. D. 344, 346–7; *Campbell* v. *Leach*, Amb. 740.

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

Building purposes.

See *Re Daniell's S. E.*, 1894, 3 Ch. 503 (where apparently this definition was not referred to, but s. 8 (1) *inf.* was treated as containing in effect the definition of a building lease); *Re Earl of Ellesmere's S. E.*, W. N., 1898, 18. It is conceived that for a lease to be

a building lease, the erecting or repairing, &c., of buildings must be the purpose or one of the purposes for which it is granted, and that what is commonly called a *repairing lease* is not a building lease within the meaning of the Act. Cases on powers in settlements (see *Truscott* v. *Diamond &c. Co.*, 20 Ch. D. 251, and cases there cited) are of little, if any, assistance in determining what is a building lease within the meaning of this Act.

(iv.) Mines and minerals mean mines and minerals whether already opened or in work, or not, and include all minerals and substances in, on, under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

Surface land.

A mining lease may include surface land necessary for the effective working of the minerals: *Re Reveley's S. E.*, 11 W. R. 744.

Right to let down.

A grant to a lessee of mines lying under the settled land, whether comprised in the settlement or not, of the right to let down the surface, is a mining lease within this definition: *Sitwell* v. *Earl of Londesborough*, 1905, 1 Ch. 460.

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

As to the exercise of the powers of the Court as regards land in the Counties Palatine of Lancaster and Durham, see s. 46 (8), (9) and notes thereon; and as to the jurisdiction of County Courts under this Act see s. 46 (10), and as to its application to Ireland see s. 65.

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(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

See s. 48, and the Board of Agriculture and Fisheries Acts, 1889 and 1903.

(xi.) Person includes corporation.

Singular.
Masculine.
Month.

For rules as to words singular or plural, or importing masculine gender, and as to meaning of "month" in Acts of Parliament passed since 1850, see note to C. A., s. 2, *sup.*

SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

III.—SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

Meaning of land.

"Land" includes any "hereditament" (see n. to s. 2 (3), *sup.*), so that any beneficial easement or right attached to settled land, as a right of way to other land, may be sold so as to extinguish it, as well as an easement burdening the settled land, created so as to sell it.

"Or any part thereof."

The words "or any part thereof" enable a sale to a railway company of the subsoil required for the purpose of driving a tunnel: *Re Pearson*, 83 L. T., 626.

Minerals.
Mansion-house.
Undivided shares.

The sale, exchange, or partition of minerals and surface separately is provided for by s. 17; the raising of money to pay for equality of partition or exchange is provided for by s. 18. The principal mansion-house and its pleasure ground, park and lands cannot be sold or leased without consent of the trustees or the Court: S. L. A., 1890, s. 10; and s. 19 contains special provision for an undivided share.

Easements.

The powers given by this s. are larger than the usual settlement powers. The power to sell an easement, right, or privilege over land could not before 1881 (see C. A. s. 62) be conferred under a settlement by conveyance to uses. Under the ordinary power to sell land, and in the absence of an express clause for the purpose, the surface could not be sold apart from the minerals (see *Buckley* v. *Howell*, 29 Beav. 546; T. A., s. 44; T. A., 1894, s. 3), and it was difficult and sometimes legally impossible to provide for all the restrictions and conditions required on sales of building land and minerals: compare *Dayrell* v. *Hoare*, 12 A. & E. 356; *Re Yates*, 38 Ch. D. 112. This s. and ss. 4, 17, 19, and 20, provide for all ordinary cases of sale, exchange, or partition, but no power is given to sell a right or interest not capable

of alienation by a tenant in fee simple: *Re Rivett-Carnac*, 30 Ch. D. 136. Further special powers may be added, and will take effect as if given by the Act: s. 57.

The sale may be to a co-owner: *Re Gaitskell*, 40 Ch. D. 416.

A tenant for life, proposing to sell at a price below that offered by a remainderman, was restrained from selling otherwise than by public auction without communicating to the remainderman any offer made: *Wheelwright* v. *Walker*, 31 W. R. 912; W. N., 1883, 154, and from selling until proper trustees had been appointed, *S. C.*, 23 Ch. D. 752.

When sale restrained.

But the tenant for life and the trustees under a will empowering the trustees to sell at the request of the person or persons entitled to the actual freehold, will not be restrained from selling the estate on merely speculative evidence adduced by the remainderman that the property is likely to increase in value: *Thomas* v. *Williams*, 24 Ch. D. 558. See also note to s. 53. A tenant for life may sell from mere caprice, or from dislike to the remainderman, or for any similar motive, but he must sell at the best price: *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531, 540 (see, however, note to s. 4 (1), *inf.*) He may sell without the sanction of the Court, notwithstanding that an administration decree has been made before or since the commencement of the Act (*ib.* 531, 540), and may exercise the powers conferred by the S. L. A.'s, when an order for sale has been suspended: *Hampden* v. *Earl of Buckinghamshire*, 1893, 2 Ch. 531, 543, but not, it seems, where an order for sale has been made under the S. E. A.: *Re Barrs-Haden*, 32 W. R. 194; W. N., 1883, 188; and where powers of leasing have been granted under that Act the leasing powers under this Act cannot be exercised without an order suspending the earlier powers: *Re Poole*, 32 W. R. 956; *Re Barrs-Haden*, *sup.* It seems therefore that an actual order for sale in an action, as distinguished from a mere administration order, prevents a sale under this Act. As to the effect on the powers of the Court under S. L. A., 1884, s. 7, of a previous order in an action giving the trustees leave to sell, see *Re Harding*, 1891, 1 Ch. 60. In *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341, Chitty, J., seemed to say that a tenant for life can sell "without prejudice" to the mortgagees on his life estate, and therefore subject to and with a deduction for their mortgages (see *S. C.* on appeal, 41 Ch. D. 375). But the power under this subs. is to sell "the settled land," which is defined by s. 2 (3) as "land and the estate or interest therein the subject of the settlement," that is to say, the whole estate without deduction for the mortgage. Then s. 50, after providing that the powers of a tenant for life shall continue after assignment of his estate for life, enacts that the s. "shall *operate* without prejudice to the assignee," not that a sale or other disposition may be made subject and without prejudice to the assignment, which would be a new power not previously given. The mortgage may be provided for and a discharge obtained under s. 5 of the C. A., or the purchaser may pay the full price without reference to the mortgage and accept an indemnity. In this way the power of the tenant for life can be exercised without

Motive of sale.

Sale after decree.

Incumbrances on life estate.

S. 3.

SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

53 & 54 Vict. c. 70, s. 74.

55 & 56 Vict. c. 31.

51 & 52 Vict. c. 20, s. 8 (4).

61 & 62 Vict. c. 55.

57 & 58 Vict c. 30, s. 22.

prejudice. See also s. 21 (ii.), *inf.*, and *Re Sebright's S. E.*, 33 Ch. D. 429, 437.

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (*inf.*, Chap. VII.), affords facilities for selling, exchanging, and leasing settled land for the purposes of that Act, and the improvements on which capital money under this Act may be expended are to include dwellings for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

As to sales, &c., to County Councils, see Small Holdings Act, 1892, ss. 12 and 13.

The S. L. A. will apply "so far as circumstances admit" to a sale under the Glebe Lands Act, 1888.

And, for the extension of the S. L. A. powers to University and College lands, see Universities and College Estates Act, 1898.

A tenant for life is not, by reason of his powers under S. L. A., a person "competent to dispose of property" within Part I. of the Finance Act, 1894: see s. 22 (2) (a).

A sale under the S. L. A. is not, it is conceived, a disposition "under the authority of any Act of Parliament" within the Disused Burial Grounds Act, 1884, s. 5: see *A. G.* v. *Trustees of the London &c. Charities*, 1896, 1 Ch. 541, 545, 548.

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

Seignory.

The seignory of freehold land is an actual estate in fee simple left in the grantor after a subinfeudation to a freehold tenant made before the statute *Quia emptores*, and carrying with it the quit rents and services. When the tenant of the manor is a copyholder the fee simple estate is a reversion, the copyholder being in law a mere tenant at will. The effect of a conveyance of the seignory to the freehold tenant is necessarily to cause a merger of his subinfeudation tenure in the seignory or estate of the superior, and thus to effect an enfranchisement, that is, an extinction of the services of the inferior; but it does not extinguish the tenant's right of common: *Baring* v. *Abingdon*, 1892, 2 Ch. 374; *Broome* v. *Wenham*, 68 L. T. (N.S.), 651.

Enfranchisement included in "sale."

Enfranchisement is in this subs. treated as a sale, and is consequently included under the term "sale" used subsequently in the Act, except in s. 55 (2), where enfranchisement includes enfranchisement under a power in a settlement.

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SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

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On enfranchisement, under this subs., of copyholds the tenant gets the mines and minerals, unless expressly excepted: MacSwinney on Mines (2nd ed.), p. 46; Scriven on Copyholds (7th ed.), 306–7. A freehold tenant of a manor always had them: *Curtis* v. *Daniel*, 10 East, 273.

"Mines & minerals."

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

Tenure not material.

As "land" means land of any tenure, this subs. includes a power to exchange freehold for leasehold or copyhold, and *vice versâ*, and it also includes an easement in existence; as to the exchange of new easements, see S. L. A., 1890, s. 5; *Re Bracken's Settlement*, 1903, 1 Ch. 265; and as to the creation of new easements for mining purposes on an exchange, see s. 17 of this Act.

The land taken in exchange may be leaseholds or copyholds the reversion to which is already subject to the settlement.

There is no provision that leaseholds taken in exchange must have not less than sixty years to run (*cf.* s. 21 (vii.), *inf.*), but see s. 53.

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

See also ss. 2 (6), 19, and, as to new easements, S. L. A., 1890, s. 5.

Ancillary powers.

The following powers in this Act and S. L. A., 1890, are ancillary to those conferred by this s.:—

(1.) To contract: s. 31.
(2.) To substitute securities: ss. 5, 24 (4).
(3.) To raise money by mortgage, to discharge incumbrances on settled land: S. L. A., 1890, s. 11.
(4.) To raise money for equality of exchange or partition: s. 18.
(5.) To concur in regard to undivided shares: s. 19.
(6.) To deal separately with surface and minerals: s. 17.
(7.) For trustees to receive, s. 22, and give receipts for money not paid into Court: s. 40.
(8.) To convey land disposed of: ss. 20, 55 (2).
(9.) To settle land acquired: s. 24.
(10.) To deal with easements on an exchange or partition: S. L. A., 1890, s. 5.
(11.) To carry into effect a predecessor's contracts: S. L. A., 1890, s. 6.

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SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

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(12.) To make sale to, or exchange or partition with, the tenant for life himself: S. L. A., 1890, s. 12.

Notice of intention to sell, &c., must be given by the tenant for life under s. 45, as amended by S. L. A., 1884, s. 5, but a person acting in good faith is exempted from inquiry whether notice has been given: s. 45 (3) of this Act. S. 53 of this Act places the tenant for life in the position of a trustee in exercising the powers of the Act: see note thereto.

Notice.

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

See, however, S. L. A., 1890, s. 18, *inf.*; the Housing of the Working Classes Act, 1890, s. 74, *inf.* Chap. VII.; the Small Holdings Act, 1892, s. 12.

Paid-up shares consideration.

The Court has allowed, for the benefit of a building estate, paid-up shares in a Waterworks Company to be allotted in lieu of purchase money: *Re Orwell Park Estate*, W. N., 1894, 135.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

The consideration may be an easement: see S. L. A., 1890, s. 5.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right,

easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

England.

"England" in Acts of Parliament includes Wales and the town of Berwick-on-Tweed (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

Special Powers.

Special Powers.

Transfer of incumbrances on land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

Incumbrance.

"Incumbrance" within the meaning of this s., includes a charge having priority to the settlement, though no money has been actually raised under it, but not a charge created by, or in exercise of any power in, the settlement, on which no money has been actually raised. The last-mentioned charge is, but the other is not, overreached by the conveyance of the tenant for life under s. 20 (2). A substituted security of any other part of the settled land may be given under this s. for any charge not overreached. See also s. 24 (4), *inf.*

"Incumbrance" also includes a rent-charge under the Improvement of Land Act, 1864: and the intervention of the Board of Agriculture and Fisheries under s. 68 of that Act is not necessary to enable the tenant for life and the incumbrancer to make use of this s.: *Re Earl of Strafford & Maples*, 1896, 1 Ch. 235.

This s. does not, by implication, prevent capital moneys arising from one part of an estate, from being applied in discharge of incumbrances on another part: *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 94; and see *Lord Monson's S. E.*, 1898, 1 Ch. 427.

It is conceived that, if a person entitled to a charge which could not be overreached by the conveyance of the tenant for life, concurs in a sale, &c., to release the land sold, &c., the charge does not attach to the purchase money, but that such person can by express agreement

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acquire a valid lien on the purchase money and the interim investments thereof without an actual re-investment in land and the creation of a substituted security under s. 24 (4); *cf. Arundell* v. *A.* 1 Myl. & K. 316. In such a case it seems that the consent of such person would be necessary to any investment or other application under s. 22 (2). As by s. 22 (5) capital money and the interim investments thereof are for all purposes of *disposition* to be treated as land, the purchase money might be held to be "other part of the settled land" within this s.

LEASES.

General Powers and Regulations.

IV.—LEASES.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

Tenant for life's power of leasing.

As before stated, "land" includes land of any tenure: see n. to s. 2 (3), therefore this s. applies to copyholds and leaseholds as well as freeholds, but by s. 2 (3) this Act applies only to "the estate or interest which is the subject of the settlement," and does not authorize the granting of any lease not warranted by that estate or interest. A tenant for life of leaseholds therefore cannot grant a lease extending beyond the term which is the subject of the settlement, nor can a copyholder grant a lease not warranted by custom or permitted by licence.

Larger than mortgagor's power.

On the same principle, though the powers of leasing given by this s. to a tenant for life are properly larger than the powers given to a mortgagor by s. 18 of the C. A., still as against a mortgagee of the fee simple whether prior to the settlement or not, the powers given by s. 18 of that Act can alone be exercised. But the mortgagee of the life estate if not in possession stands in no better position than the successors in title, except that as against him no lease at a fine can be made, but he is bound by any other lease: 50 (3).

Lease by equitable owner.

Leases may be made by an equitable as well as the legal tenant for life, so as to create a legal term where the legal estate is the subject of the settlement (s. 20), and the rent and the benefit of the covenants become annexed to and run with the legal reversion (C. A., s. 10).

Exception of mines and minerals.

A lease may be made containing an exception of mines and minerals: *Re Gladstone*, 1900, 2 Ch. 101 (overruling *Re Newell & Nevill*, 1900, 1 Ch. 90); and *cf. Re Duke of Rutland's S. E.*, 1900, 2 Ch. 206.

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A right to let down the surface is an "easement, right, or privilege" within this s., and a grant thereof to a lessee of the mines is good as a mining lease: *Sitwell* v. *Earl of Londesborough*, 1905, 1 Ch. 460.

As to leases on behalf of a tenant for life lunatic not so found, see Lunacy Act, 1890, ss. 116 (2), 120 (*h*); and *Re Salt*, 1896, 1 Ch. 117.

Lunatic not so found.

It is conceived that a single lease of contiguous land, held under two settlements with different remainders over, is not within this s., see *Tolson* v. *Sheard*, 5 Ch. D. 19; Farwell on Powers, 2nd ed., 598. And as to a lease of settled land with chattels not settled, see the arguments in *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, 1893, 3 Ch. 169, 182, 186. It seems that a tenant for life may in good faith lease to his wife: see S. C. 196. In the exercise of the statutory power of leasing no reference need be made to the Act, and this is the usual practice: *Mogridge* v. *Clapp*, 1892, 3 Ch. 382. A lessee, dealing in good faith, is not bound to inquire whether there are trustees for the purposes of the Act, nor affected by the fact that there are none unless he has actual notice; and *semble* the lease would not necessarily be bad, even if the lessee had such notice: S. C., 395, 401.

Land under two settlements.

Settled land and chattels not settled.

Lease to wife.

No reference to Act.

Trustees.

A long term, bad as a building or mining lease, may be good as an occupation lease for a shorter term: *Campbell* v. *Leach*, Amb. 740; *Alexander* v. *A.*, 2 Ves. sen. 644.

As to a lease by a tenant for life under a settlement prior to the Act "in exercise of every power enabling him," see *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687, and s. 56, *inf.*

For a discussion of the question whether the donee of a power of leasing can grant a lease to a trustee for himself, see *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836. S. 12 of the S. L. A., 1890, does not apply to leases.

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

A lease for a term not exceeding three years may now be by writing only: S. L. A., 1890, s. 7 (iii.).

The effect of this subs. is that every existing lease must be surrendered unless it is within one year of expiring: *Re Farnell*, 33 Ch. D. 599; or unless the new lease be made to the person in possession under the old lease, when it will, without any actual surrender, operate as a surrender in law: Sug. Pow. 8th ed., 763.

Concurrent lease.

A concurrent lease is not a lease "taking effect in possession:" see Farwell on Powers, 2nd ed., pp. 611, 619–20; Sugden on Powers, 8th ed., pp. 769–77.

Lease in possession.

As to what is a lease in possession see n. to C. A., s. 18 (5), *ante*, and n. to s. 13, *post*; and as to what is not, *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, 1893, 3 Ch. 169, 192: it is conceived that the definition, in s. 2 (10) (i.), of "possession" is not applicable here.

S. 7.

LEASES.

General Powers and Regulations.

Surrender of underleases on renewal.

Under 4 Geo. 2, c. 28, s. 6, when a lease is duly surrendered in order to be renewed, it is not necessary to obtain a surrender of underleases, but the new lease is, without surrender of underleases, made as valid as if the underleases had been surrendered, and the underlessees are placed in the same position as regards re-entry, etc., as if the old lease had been kept on foot: see *Re Ford's S. E.*, L. R., 8 Eq. 309; and 8 & 9 Vict. c. 106, s. 9; also s. 12 (ii.), *inf.*

It may be a question whether the Act of Geo. 2 enables a lease to be made under this s. without surrender of all underleases. Clearly the lease could not be so made at a higher rent, or with more onerous covenants than the surrendered lease, as then there would be no remedy against the underlessee for anything more than the liability under the surrendered lease.

"Month."

"Month" means calendar month: see n. to C. A., s. 2.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

"Rent."

"Rent" includes reservations in kind as well as money, s. 2 (10) (ii.) and n. thereon, *sup.*

Value of surrendered lease.

The value of a surrendered lease may be taken into account in fixing the rent of a new lease, s. 13 (5); and as to its being unnecessary to take into account, on a lease to a tenant of a holding, the value of his improvements, see the Agricultural Holdings (England) Act, 1883, s. 43.

Leases to County Councils, and for working classes.

As to leases to County Councils, see Small Holdings Act, 1892, s. 12; and for working classes, see Housing of the Working Classes Act, 1890, Chap. VII., *inf.*, and S. L. A., 1890, s. 18.

Fine.

By S. L. A., 1884, s. 4, a fine paid for a lease under this Act is capital money.

Where at the date of the settlement the settled land is subject to a lease containing a covenant for renewal on a fine, the tenant for life will be entitled to receive the fine for his own use. He is bound to grant the lease independently of this Act, and s. 12 (ii.) enables him to create a legal term without the aid of the Court. The fine is a casual profit similar to the fines and heriots payable to the lord of a manor: see *Brigstocke* v. *B.*, 8 Ch. D. 357; *Re Medows*, 1898, 1 Ch. 300. On the construction of a settlement, a tenant for life may be entitled to all fines: *Simpson* v. *Bathurst*, L. R. 5 Ch. App. 193.

In *Chandler* v. *Bradley*, 1897, 1 Ch. 315, it was held that a bribe to the tenant for life could not be treated as a fine, and that the lease was void. In *Re Handman & Wilcox*, 1902, 1 Ch. 599, the question whether a lease granted under similar circumstances was void or only voidable was left open by the C. A.

"Best rent."

As to the matters to be considered in determining whether the best rent has been reserved, see *Dowager Duchess of Sutherland* v. *Duke*

of Sutherland, 1893, 3 Ch. 169, 195; *Re Aldam's S. E.*, 1902, 2 Ch. 46, 59. "Money laid out" does not cover past voluntary expenditure, and must be with reference to the granting of the lease: *Re Chawner's S. E.*, 1892, 2 Ch. 192, 196. And query whether, on renewing a mining lease, the lessee can, under this subs., be allowed to "work up shorts;" compare ss. 9 (1) (ii.); 13 (5).

"Money laid out."

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Covenant.

The Act requires binding *legal* covenants by all the lessees, hence a lease by a tenant for life to himself and others is bad: *Boyce* v. *Edbrooke*, 1903, 1 Ch. 836.

Agreement for lease.

A lease for three years or less may be by writing only, with an agreement instead of a covenant by the lessee for payment of rent: S. L. A., 1890, s. 7 (iii.).

Re-entry.

A condition of re-entry allowing more than thirty days will render the lease void: *Doe* v. *Burrough*, 6 Q. B. 229.

The provision in this subs. as to a condition of re-entry is not applicable in the case of a lease of an incorporeal hereditament: *Sitwell* v. *Earl of Londesborough*, 1905, 1 Ch. 460.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

The execution of counterpart need not be contemporaneous with the lease: *Fryer* v. *Coombs*, 11 A. & E. 403, 406; Farwell on Powers, 2nd ed., 634.

(5.) A statement contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Statement of fact or calculation.

A statement of fact, indorsed on a lease, and signed by the tenant for life, that money covenanted in the lease to be laid out by the lessee has been laid out accordingly, and a statement of calculation recited in a lease that the rent thereby reserved does not exceed one-fifth part of the full annual value of the land comprised therein with the buildings thereon when completed (see s. 8 (3) (iii.)), are instances of statements within the meaning of s. 7 (5).

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LEASES.

General Powers and Regulations.

Contract to lease.

Notice.

As to the power of a tenant for life to contract for leases, see s. 31 (1) (iii.) (2). And as to notice of intended leases, see s. 45 as amended by S. L. A., 1884, s. 5; and S. L. A., 1890, s. 7 (i.); and as to the absence of trustees of the settlement being immaterial in case of leases for twenty-one years or less, see the same s. (ii.), and in the case of leases generally, unless a fine is taken, see *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 395, 401.

Building and Mining Leases.

Regulations respecting building leases.

Building and Mining Leases.

8.—(1). Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Compare C. A., s. 18 (9) (10), *sup.*

For the definitions of a "building lease" and "building purposes," see s. 2 (10) (iii.), *sup.*, and n. thereto.

An agreement to expend a fixed sum in repairs is within this s.; but the Court, in the exercise of its discretion under S. L. A., 1884, s. 7 (i.), refused to sanction a lease for thirty years containing such an agreement, on the ground that, in the case before it, the repairs were such as the tenant for life ought herself to have done: *Re Daniell's S. E.*, 1894, 3 Ch. 503; and see *Re Earl of Ellesmere's S. E.*, W. N., 1898, 18.

Repairs.

A lease cannot be granted at less than the "best rent" in consideration of past voluntary expenditure; the words "in consideration" import a consideration in law: *Re Chawner's S. E.*, 1892, 2 Ch. 192.

Past consideration.

A lease of part, not built upon, of land comprised in a building agreement, is not a building lease within this s.: *Re Sabin*, W. N. 1885, 197.

A tenant for life may now grant building leases with an option to purchase the fee simple within ten years: S. L. A., 1889, s. 2.

Option to purchase.

9.—(1.) In a mining lease—

Regulations respecting mining leases.

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

See the definitions in s. 2 (10), (ii.), (iv.), *sup.*

S. L. A., 1890, s. 8, *inf.*, provides that the rent may vary with the price of the minerals.

Rent variable with price.

(ii.) A fixed or minimum rent may be made payable with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

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LEASES.

Building and Mining Leases.

Minimum rent.

A minimum rent may be reserved not commencing immediately and increasing year by year during the early part of the term: *Re Aldam's S. E.*, 1902, 2 Ch. 46. In this case (there were special circumstances) it was held that the lease might contain a proviso for cesser of the minimum rent when all the workable coal had been paid for at the acreage rent, and also a wayleave for foreign coal to continue after such cesser at a nominal rent. The ground of the decision was that on the evidence the particular lease satisfied the requirements of the Act, viz., "best rent" (s. 7 (2)), and due regard to the interests of all persons entitled (s. 53).

Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity;

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

"Building purposes": see s. 2, 10 (iii.).

This s. is supplemented, as to grants in fee simple for building

purposes, by S. L. A., 1890, s. 9, which provides for a perpetual rent or rent-charge reserved on such a grant being swept into the settlement.

As to grants to County Councils in perpetuity or at fee-farm or other rents, see Small Holdings Act, 1892, s. 13.

For form of summons under this s., see Forms III., IV., and V., *inf.*, Chap. VIII.

A general authority to grant building leases for 200 years, of the estate of an infant tenant in tail of the age of eighteen years, was refused in *Cecil* v. *Langdon*, 54 L. T. 418.

For orders under this s., see Seton, 6th ed., 1827 *et seq.*

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

This s. does not apply to a lease made under s. 12 (i.), *inf.*, for giving effect to the contract of a predecessor who was owner in fee: *Re Kemeys-Tynte*, 1892, 2 Ch. 211; nor does it, by virtue of s. 56 *inf.*, apply to a lease granted, "in exercise of all powers enabling him," by a tenant for life empowered to grant mining leases by a settlement prior to the Act, and not containing a like provision: *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.

As to portion of rent set aside as capital.

Under the S. E. A., s. 13, the leasing powers are to be given to trustees, and the portion of rent to be set aside as capital is by the lease made payable to them. Under this s. the tenant for life grants the lease, and the whole rent must be reserved to him as the reversioner. The trustees are not required to be parties to the lease, nor is it provided that the portion of rent to be set aside as capital shall be paid to them by the lessee. They need not necessarily know of the lease. It seems therefore that the tenant for life must receive the whole rent, and pay over to the trustees the part to be set aside as capital: but see Forms II. (*f*), X., Chap. VIII., *inf.*; and Seton, 6th ed., 1828, Form 5.

The portion of rent set aside under this s. is in effect the consideration paid by the tenant for life for the privilege of granting the lease for sixty years. But the Act does not affect any of his common law rights, as tenant for life, to open and work mines if he is unimpeachable for waste, and to work open mines if he is impeachable for waste. It is a common practice to provide expressly against capitalizing any

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LEASES.

Building and Mining Leases.

part of a mining rent, thus placing the tenant for life in the same position as under a settlement with the usual leasing powers. And accordingly Stirling, J., in a case of *Bassett* v. *Higgens* (January, 1895), where a settlement was made under the direction of the Court, pursuant to a will which contained no special direction on the point, allowed a clause exempting the tenant for life from setting aside any part of the mining rent as capital: compare *Daly* v. *Beckett*, 24 Beav. 114, 123.

Impeachable for waste in respect of minerals.

The words "where the tenant for life is impeachable for waste in respect of minerals" do not apply to the case of a tenant for life of open mines. A tenant for life may work open mines although impeachable for waste: *Re Chaytor*, 1900, 2 Ch. 804. Consequently on a lease under the Act of such mines, one fourth only of the rent is required in any case to be set aside. The provision for setting aside is in effect the same as that in the S. E. A., s. 4 (3).

Opened and unopened mines.

As to the distinction between opened and unopened mines see *Re Maynard's S. E.*, 1899, 2 Ch. 347, and cases there cited; *Greville-Nugent* v. *Mackenzie*, 1900, A. C., 83; *Re Chaytor, sup.*

Tenant for life of proceeds of sale.

A tenant for life of the proceeds of sale under a trust for sale and entitled to the rents until sale, though not properly impeachable for waste, must set aside three fourth parts of the mineral rent under a lease of unopened mines: *Re Ridge*, 31 Ch. D. 504.

Contrary intention.

As to what is "a contrary intention" within the meaning of this s., see *Duke of Newcastle's Estates*, 24 Ch. D. 129, 143; *Re Bagot*, 1894, 1 Ch. 177, 184; and compare *Lonsdale* v. *Lowther, sup.* *Qu.*, whether in the first-mentioned case this s. applied at all.

For a form of summons by a lessee for payment into Court of the part of the rent to be set aside under this s., see Forms II. (*f*), X., *inf.*, Chap. VII., and for an order for such payment, see Seton, 6th ed., 1830, Form 6.

Special Powers.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

"Predecessors in title" includes all predecessors, those prior to as well as those under the settlement. In like manner "successor in title" in s. 31 (2) includes a successor subsequent to as well as a successor under the settlement.

As to the effect of a contract of the kind mentioned in this subs. made before this Act, see *Davis* v. *Harford*, 22 Ch. D. 128.

Under this subs., a contract by an owner in fee, to grant a lease which could not have been granted under the S. L. A., can be effectuated: *Re Kemeys-Tynte*, 1892, 2 Ch. 211, 214; in which case it was held, p. 213, that S. L. A., 1890, s. 6, did not apply to leases.

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

Where a testator who has contracted to grant a lease dies, having devised the property in settlement, or where the land is leased with a covenant for renewal, the tenant for life could not, except under an express power for the purpose, give the lessee a legal term without the aid of the Court, to be obtained in an action by the lessee for specific performance. In *Cust* v. *Middleton*, 3 De G. F. & J. 33, an Act of Parliament was thought necessary in order to carry into effect the contracts of the testator in the case first mentioned. The effect of subss. (i.) and (ii.) of this s. is to render an action unnecessary in either case.

And as to the validity of covenants for renewal in leases under powers, see *Gas Light & Coke Co.* v. *Towse*, 35 Ch. D. 519; and compare *Dundas* v. *Vavasour*, 39 Sol. J. 656—a case on s. 18 of the C. A.

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Where a lease was void for some want of compliance with the power, and the power required the best rent to be reserved, it was sometimes impossible, on account of building or improvements effected by the lessee increasing the value, to give him a valid lease on the terms to which he was justly entitled. This subs. now enables the proper lease to be granted, adopting the principle of the Acts 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17.

Surrenders.

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the

S. 13.

LEASES.

Surrenders.

whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

"Or any part thereof."

For effect of surrender of part of demised land on condition of re-entry in lease made before the C. A., see note to s. 12 of that Act.

Acceptance of surrender by equitable tenant for life.

This s. appears to enable an equitable tenant for life having no legal reversion to accept a surrender of a term so as to merge it, just as s. 6 enables him to grant a lease creating a legal term, though he has no legal estate. He acts in each case under the statutory authority conferred by this Act; and the surrender would be legally good so as to effect a merger of the term even as against a mortgagee of the equitable life estate, and therefore, it would seem, sufficient to enable the grant of a new lease in possession. But where the life estate is a legal estate, the legal reversion would be in the mortgagee and his consent to accept the surrender seems necessary (see n. to C. A., s. 18 (5), so that a valid new lease could not be granted under s. 7 (1) unless the mortgagee's acceptance of the surrender of the previous lease be obtained: but see s. 50, *inf.*

When sufficient to enable new lease.

Consideration for surrender.

Money paid to a tenant for life as the consideration for accepting the surrender of a lease belongs, as a general rule, to him absolutely: *Re Hunloke's S. E.*, 1902, 1 Ch. 941. The rule is not expressly altered by this s., but will, it is conceived, still hold good as to all leases, whether made under the powers of the Act or otherwise, and notwithstanding the provisions of s. 53, this s. being merely in affirmance of the common law right of a legal tenant for life, with an extension to the case of an equitable tenant for life; but not otherwise altering the position of a tenant for life: compare *Earl Cowley* v. *Wellesley*, 1 Eq. 656; *Brigstocke* v. *B.*, 8 Ch. D. 357; *Re Medows*, 1898, 1 Ch. 300. But see *Re Guthrie's S. E.*, 1902, 1 Ch. 942 note (2), in which the Court on an application under the S. L. A., 1884, s. 7, to approve a contract for a surrender to tenants for life under s. 63 of this Act, directed the money paid as consideration for the surrender to be treated as capital. It is conceived that where the surrender is one which an actual trustee would not be justified in accepting, the tenant for life could not retain for his own use the sum received (see note to s. 53). Thus, if there were a lease of five acres at £10 rent, and the tenant for life should under subs. 2 take a surrender of one acre, apportioning £9 as the rent of that acre, and leaving £1 only payable in respect of the other four acres, payment being made to him for so doing, this would be a clear breach of duty towards the remaindermen, and as the apportionment would be made under a power conferred by the next subs., it can scarcely be doubted that the tenant for life would be held liable as trustee for the sum received by him, and that it would be treated as capital money. So too if the tenant accepted a surrender for a money payment to cover dilapidations.

Purchase of surrender.

If the tenant for life purchases a surrender from a lessee, he must pay the consideration money himself, unless the term has more than

sixty years to run, in which case it is conceived the purchase could be made under s. 21 (vii.) *inf.*

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

As to surrender of underleases, see n. to C. A., s. 18 (5), and to s. 7 (1) of this Act.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

Subs. 5 enables the value of a lease beneficial to the lessee, which is surrendered, to be taken into account on the grant of a new lease. Under the ordinary power of leasing this could not be done: Sug. Powers, 8th ed., 787.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

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LEASES.

Copyholds.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

Fine on licence, whether capital.

If the licence be granted on a fine, the question whether the fine is capital or casual profit must be decided on the same principle as in case of a fine on an ordinary lease under this Act (see n. to s. 7 (2)). If the licence is in accordance with the custom, it is not granted under this Act and the fine will be casual profit. Where a manor is brought into settlement, it is best to provide expressly for the fines: *Simpson* v. *Bathurst*, L. R. 5 Ch. 193.

Effect of licence.

By a licence under this s. it is conceived that the copyholder can only grant a lease in all respects the same as a tenant for life could grant under this Act. If this were not so, an onerous lease, at a large fine, might be granted, and the succeeding lord would be prejudiced in case of forfeiture or escheat.

Act does not override custom.

Where the lord is restricted by custom from granting licences to lease beyond a certain term, as in *Hanbury* v. *Litchfield*, 2 My. & K. 629, this s. will not enable him any more than a tenant in fee simple to override the custom by a mere licence. Notwithstanding the licence, a lease by the copyholder for a term longer than that allowed by the custom will be a forfeiture capable of being enforced by the next succeeding lord. Nor could the tenant for life by joining in the demise make a lease contrary to the custom, such lease being in the nature of an underlease and not a lease in possession, s. 7 (1). A lord entitled in fee simple might by joining with the copyholder grant a lease not warranted by the custom, but this, it is conceived, would be a lease by the lord, and a release of his right by the copyholder, so that the reversion would be in the lord and not in the copyholder.

"Steward;" see s. 2 (10) (vi.).

SALES, LEASES, AND OTHER DISPOSITIONS.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

Mansion and Park. Restriction as to mansion house, park, &c.

15. *Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.*

This s. is repealed, and with some variation, re-enacted, by S. L. A., 1890, s. 10.

Streets and open spaces.

Streets and open Spaces.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

Dedication for streets, open spaces, &c.

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Dedication to the public.

Dedication to the public is a term generally applied to the act of throwing roads open to the use of the public, but without the aid of this s. an effectual dedication could only be made by an owner of the fee simple. A dedication by a leaseholder or tenant for life in right of

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SALES, LEASES, AND OTHER DISPOSITIONS.

his estate does not bind the reversioner or remainderman: *Wood* v. *Veal*, 5 B. & Ald. 445; *Harper* v. *Charlesworth*, 4 Barn. & Cr. 574. This s. enables a tenant for life to bind those in remainder.

Streets and open spaces.

Different from conveyance.

A conveyance of land to trustees on trust for public purposes is not strictly a dedication to the public; it creates, as a rule, a trust for charitable purposes, in which case the deed must be enrolled and otherwise perfected according to the provisions of the Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). A conveyance to a local authority or corporation can only be made where they are empowered by statute to acquire the land. Parts I. and II. of the Act last mentioned do not then apply: see the Amendment Act of 1892 (55 Vict. c. 11). On a simple dedication to the public the freehold in the soil still remains in the person making the dedication: *Reg.* v. *Pratt*, 4 E. & B. 860; unless by any statute it becomes transferred to a local authority: see Public Health Act, 1875, s. 149; *Coverdale* v. *Charlton*, 4 Q. B. D. 104; *Tunbridge Wells Corpn.* v. *Baird*, 1896, A. C. 434; Metropolis Local Management Act, 1855, s. 96; *Rolls* v. *Vestry of St. George, Southwark*, 14 Ch. D. 785; Local Government Act, 1888, ss. 64, 97; *Curtis* v. *Kesteven County Council*, 45 Ch. D. 504; Local Government Act, 1894, ss. 6, 7, 8, 67. It is not necessary that a deed effecting a simple dedication to the public should be perfected as required by the Charitable Uses Act; it operates merely as evidence of the transaction, and not as a conveyance.

Conveyance to give effect to this s.

Sect. 55 (2) gives a general power to the tenant for life under which he may execute any deed necessary for giving effect to the provisions of this s.

Cost of works under this s.

Expenses incurred in executing works under this s. may be raised by mortgage under s. 21 of the S. E. A., or they may be paid for out of any money being or representing capital money under this Act: see ss. 21 (x.), 25 (xvii.), 32, and 33.

Surface and Minerals apart.

Separate dealing with surface and minerals, with or without wayleaves, &c.

Surface and Minerals apart.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to

and in consideration of the reservation of an undivided share in mines or minerals.

See also s. 4 (6); S. L. A., 1890, s. 5; and compare T. A., s. 44.

Surface and Minerals apart.

Under a power in a settlement easements could not formerly be granted, as they could not be raised by way of use. This difficulty has been removed by the C. A., s. 62; but no question of the kind can arise under this Act, which gives a common law power to convey the fee independently of the Statute of Uses.

Grant of easements.

Trustees may under this s. during a minority sell surface apart from minerals, though this is not authorized by the power of sale in the settlement, and the sale being under the statutory power the consent of guardians to a sale, required by the settlement power, is not necessary: *Duke of Newcastle's Estates*, 24 Ch. D. 129, 142.

Consent of guardians to sale by trustees not necessary.

For a grant of a wayleave for foreign coal to continue at a nominal rent after the coal demised had been worked out, see *Re Aldam's S. E.*, 1902, 2 Ch. 46. No separate rent need be reserved for a wayleave: S. C., 57, 61.

Wayleave.

As to reserving mines and minerals in leases other than mining leases, see *Re Gladstone*, 1900, 2 Ch. 101; and compare *Re Duke of Rutland's S. E.*, *ib.*, 206.

See also *Re Pearson*, cited in note to s. 3 (i.).

Mortgage.

Mortgage.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

Mortgage for equality money, &c.

As to mortgages, see ss. 5, 24 (4), and S. L. A., 1890, s. 11.

The money raised by mortgage under this s. being capital money must be paid either to the trustees or into Court (s. 22). The receipt of the trustees is a complete discharge, and the person making the advance is absolved from seeing that it is necessary to raise the money (s. 40), or that the requirements of the Act are complied with (s. 54). There is no power in this Act to raise money for improvements.

It has been held (*Re Bruce*, W. N., 1905, 120), that money may be raised under this s. to purchase a reversion within s. 21 (vi).

For a form of summons for payment into Court by a mortgagee under this s., see Rules under S. L. A., 1882, Form XI., Chap. VIII., *inf.*; as to raising money for enfranchisement of copyholds, see also Copyhold Act, 1894, s. 36.

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SALES, LEASES, AND OTHER DISPOSITIONS.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

Undivided Share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

See, on this s., *Cooper* v. *Belsey*, 1899, 1 Ch. 639 (over-ruling *Re Collinge's S. E.*, 36 Ch. D. 516; 36 W. R. 264); also *Williams* v. *Jenkins*, W. N., 1894, 176; and note on s. 2 (6).

And, as to duties of a fiduciary vendor concurring with owners of other property, see *Re Cooper & Allen*, 4 Ch. D. 802.

For an order carrying out purposes of this s., see Seton, 6th ed., 1828, Form 5.

Conveyance.

Completion of sale, lease, &c., by conveyance.

Conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange, or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

See on this exception *Re Mundy & Roper*, 1899, 1 Ch. 275, 290, and as to what is the "settlement," see n. to s. 2 (i.) "Compound Settlement."

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

"Actually raised": see *Connolly* v. *Keating*, 1903, 1 Ir. R. 353.

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

Easements, rights, and privileges.

The reference in this s. to "easements or other rights or privileges sold or leased," applies only to cases where they are conferred apart from the land, and created *de novo* on a sale or lease: see note to s. 3 (iii.) and s. 17, also S. L. A., 1890, s. 5.

S. 20.

SALES, LEASES, AND OTHER DISPOSITIONS.

Conveyance.

Conveyance.

This s. confers on the tenant for life a power, generally called a common law authority, as the exercise of it enables him to transfer the common law seisin (Sugden on Powers, 8th ed., 45); but it is more properly a statutory power. The land passes, not as under ordinary settlements by revocation and appointment of uses, but by conveyance of the estate itself in the land, in the same way as when a testator authorizes his executors to sell his lands without making any devise to them. The usual mode of exercising such a power in a will is by bargain and sale at common law (*i.e.* not a bargain and sale passing the use merely).

How conveyance operates.

The conveyance under this s. passes the common law estate in the case of freeholds and leaseholds, and the right to admission in the case of copyholds, and that whether the person conveying has a legal or equitable estate, and on the estate so passed, in case of freeholds, uses may be declared. Also, in case of copyholds admittance may be had without any surrender, and the conveyance divests any legal estate vested in trustees under the settlement. On the grant of a lease the term created is a legal term, and the C. A., ss. 10, 11, annexes the rent and covenants in every case to the legal reversion, notwithstanding that the lessor has no legal estate. But this Act only operates on the estate, which is the subject of the settlement, and the legal estate passes only where it passed under, or has been otherwise conveyed to the uses of, the settlement, and has not been subsequently disposed of to secure money actually raised. If there be a mortgage in fee outstanding prior to the settlement, or made since under a power, the legal estate conferred by the mortgage will not be overreached or defeated by a conveyance under this Act, but where a lease can be granted binding on the mortgagee under the C. A., s. 18, a legal term will be created.

Lease.

Rent, &c., annexed to reversion.

Estate of trustees.

It follows that where leaseholds or copyholds are vested in trustees on trusts corresponding to uses declared of land conveyed in fee simple, or where the legal estate in freeholds is vested in the trustees, they will not be necessary parties to convey; the conveyance by the tenant for life alone divests the estate of the trustees. But it is conceived that the legal estate, in order to pass by the tenant for life's conveyance, must in some way be expressly made subject to the settlement. For instance, if an equity of redemption subject to a mortgage be settled, the mere payment of the mortgage money would not enable the tenant for life to convey the legal estate vested in the mortgagee. If, however, the settlement be by way of trust and not in such a form as would create legal limitations, then after a re-conveyance to the proper trustees, such re-conveyance being part of the settlement, the tenant for life could convey the legal estate though not actually derived through the settlement itself. It is conceived that the re-conveyance must be in the proper form and to the proper trustees. If the legal estate is made to vest in the trustees when it ought to be conveyed to uses, it seems doubtful whether the conveyance of the tenant for life would pass it.

As regards copyholds (subs. 3), the steward will enter on the rolls the settlement in the same manner as a will giving executors or trustees power to sell would be entered, and he will also enter the deed of conveyance. The rolls will thus be complete as regards the title, no surrender being necessary.

Enrolment of copyhold assurance.

Fine on admission.

Where a testator who has been admitted devises his copyhold on trust, and the tenant for life sells before the trustees are admitted, the lord is not entitled to a fine on the admission of the trustees as well as a fine on the admission of the purchaser: *Re Naylor and Spendla*, 34 Ch. D. 217 (*dissentiente*, Fry, L.J.). The will and the Act taken together operate as if the will had given the tenant for life express power to sell, in which case only one fine would be payable. This seems to answer the difficulty felt by Fry, L.J., the testator having died in 1885.

What estates overreached.

The obvious intention of subs. (2) was to give to a conveyance (whether on sale, mortgage, lease, or otherwise) by a tenant for life the same overreaching effect as a like assurance under a power in a settlement. The "estates, interests and charges" excepted by subs. 2 (ii.) must therefore be confined to estates, interests and charges conveyed or created under the powers or trusts of the settlement, or to give effect to any charge thereunder, as *e.g.* to pay arrears of a jointure under C. A., s. 44 (4). Otherwise the exception would extend to cover mortgages and charges not only by the tenant for life of his life estate, but also by any remainderman, rent-chargee, portioner, &c. Notwithstanding the dicta in *Re Sebright's, S. E.*, 33 Ch. D. 429, 438, and *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 341, 342, it is conceived that the exception does *not* extend to mortgages and charges by the tenant for life of his life estate, for these are expressly dealt with by s. 50; and if it extended to mortgages by remaindermen and others, it would be a practical impossibility to make a title under the Act at all. There is no reason why the assignee of a remainderman, whether purchaser (as to whom, see *Wheelwright* v. *Walker*, 23 Ch. D. 752) or mortgagee, should have any higher rights than the remainderman himself. The dicta of Lindley, M.R., and Chitty, L.J., in *Re Mundy & Roper*, 1899, 1 Ch. 275, 289, were not directed to this point.

Death duties.

A purchaser is not concerned with the payment of succession duty payable under the settlement: *Re Warner's S. E.*, 17 Ch. D. 711; 7 Bythewood & Jarman, 4th ed., 294, 295; nor of future estate duty: Hanson, 5th ed., 107.

As to restoring on a re-settlement the life estate of the tenant for life under a prior settlement, see n. to s. 2 (i.) "Compound Settlement."

Power of trustees restricted.

Any possible conflict between a conveyance by the tenant for life and a conveyance by the trustees is prevented by the latter part of s. 56 (2), which precludes trustees from exercising powers similar to those given by the Act unless the tenant for life consents.

Title deeds held by trustees.

Where the estate of the tenant for life is equitable merely, and his trustees hold the deeds (but see *Re Burnaby's S. E.*, 42 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369, for decisions giving him the custody on

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SALES, LEASES, AND OTHER DISPOSITIONS.

Conveyance.

Enfranchisement.

terms, and also *Re Beddoe*, 1893, 1 Ch. 547; *Re Newen*, 1894, 2 Ch. 297), it may be a question whether trustees for purposes of the S. L. A.'s are or are not bound, on a sale by him, to give an acknowledgment of the purchaser's right to production; and see *Onslow* v. *Lord Londesborough*, 10 Hare, 67, 75.

Enfranchisement is included in this s., see note to s. 3 (ii.).

In addition to the special powers given by this s., a general power is given by s. 55 (2) for completing sales, &c., under this Act.

As to power for tenant for life to convey, so as to carry out a predecessor's contract, see S. L. A., 1890, s. 6; and for trustees to do so, on sale, &c., to tenant for life himself, s. 12 of that Act.

INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

Capital money under Act; investment, &c., by trustees or Court.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others, of the following modes (namely):

See s. 2 (9) and n. thereto, *sup.*

Mortgagee may be paid.

Improvements.

Purchase by tenant for life.

The words "subject to payment of claims," &c., enable the purchase-money to be applied in discharge of what is due to a mortgagee who concurs in conveying; and also in a proper case and subject to the proper certificates being obtained in reimbursing the tenant for life money expended by him on improvements executed under a scheme approved by the trustees when they had no capital money in hand: *Re Duke of Norfolk's Parly. Estates*, 1900, 1 Ch. 461; but the tenant for life has no charge on the inheritance for authorized improvements paid for by him: *Standing* v. *Gray*, 1 Ir. R. 49. In default of an approved scheme the Court may authorize his being reimbursed under S. L. A., 1890, s. 15. It is conceived that if, there being no capital money in hand, the tenant for life purchased land out of his own money, and directed it to be conveyed to the uses of the settlement on the understanding that he was to be repaid out of capital money when it arose, he would have no claim to be repaid out of capital money generally, the purchase not having been made under the Act, but would have a lien on the land purchased, which would, it is thought, be postponed to the claims of the settlement in respect of any capital money subsequently expended on such land by his direction in improvements or otherwise under this s.

As to capital money arising from land in Ireland being applicable

for purposes of land in England subject to the same limitations, see *Re Eyre Coote*, W. N., 1899, 222.

The Court will not make a prospective order as to capital money not yet received: *Re Millard's S. E.*, 1893, 3 Ch. 116, distinguished in *Re Duke of Norfolk's P. E., sup.*; and see also *Re Marq. of Bristol's S. E.*, 1893, 3 Ch. 161 (a case under S. L. A., 1890, s. 15).

"When received."

(i.) In investment on Government securities or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

See, as to the securities on which trustees are by law authorized to invest trust money, T. A., part i.; also s. 2 (10) (viii.), *sup.*

Interim investment of money to be laid out in land.

Where money or investments are held upon trust to purchase land to be settled, the trustees may invest in accordance with this subs.: *Re Mackenzie*, 23 Ch. D. 750; *Re Tennant*, 40 Ch. D. 594; *Re Mundy's S. E.*, 1891, 1 Ch. 339; *Re Byng's S. E.*, 1892, 2 Ch. 219. An investment in debentures issued by a local authority under s. 27 of the Local Loans Act, 1875 (38 & 39 Vict. c. 83) was disallowed in *Re Maberly*, 33 Ch. D. 455; but see now T. A., ss. 1 (*m*), 5 (3).

As to investment by trustees abroad, see *Re Simpson*, 1897, 1 Ch. 256; *Re Lloyd*, 54 L. T. 643; W. N. 1886, 37: compare *Re Freeman*, 37 Ch. D. 148.

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

See *Re Sebright's S. E.*, 33 Ch. D. 429, 437.

This subs. includes a mortgage for a long term, which is one mode of mortgaging the fee simple, and "affects the inheritance": *Re Frewen*, 38 Ch. D. 383; and see remarks of Chitty, J., in *Re Esdaile*,

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54 L. T. 637, 640, also a mortgage of leaseholds by sub-demise, which is the usual mode of mortgaging leaseholds, and "affects the whole estate the subject of the settlement." An incumbrance on the estate of the tenant for life is excluded, and so is a terminable charge, as a jointure rent-charge. S. 53 is alone sufficient to prevent a tenant for life paying off a charge of any such kind out of capital.

Mortgages discharged on a sale need not be kept on foot by reason only that the tenant for life's estate is subject to a term for paying off mortgages out of rents and profits: *Re Richardson*, 1900, 2 Ch. 778.

Land tax.

As to redemption of land tax, see also Finance Act, 1896, ss. 32, 33.

Extraordinary tithes.

As to redemption of extraordinary tithes, see also 49 & 50 Vict. c. 54, s. 6.

Estate duty.

As to payment of estate duty, see Finance Act, 1894, s. 9 (7).

Improvement rent-charge.

Terminable improvement rent-charges created under the Land Improvement Act, 1864, or similar Acts, were not incumbrances payable under this subs. out of capital money: *Re Knatchbull*, 27 Ch. D. 349, 29 *ib.* 588; but they are now made so payable by the S. L. A., 1887, *inf.* A charge under the Agricultural Holdings (England) Act, 1883, s. 29, as modified by the Agricultural Holdings Act, 1900, s. 3, made in respect of any improvement authorized by those Acts is an incumbrance within this subs. Also expenses incurred by a local authority in sewering, &c., and charged on the settled land under statutory powers: *Re Legh's S. E.*, 1902, 2 Ch. 274. Also an annual sum issuing out of tithes for a long term: *Re Esdaile*, *sup.* But a terminable charge, imposed in lieu of tithe rent-charge on land in Ireland, is not: *Re Leinster's Estate*, 23 L. R. Ir. 152.

Agricultural Holdings Acts charge.

Sewering &c. expenses.

Annual sum out of tithes.

Incumbrance in this subs. means an incumbrance affecting the land sold, or any other land which is the subject of the settlement: *Re Chaytor*, 25 Ch. D. 651; *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 94–6; and compare *Re Duke of Marlborough's Settlement*, 32 Ch. D. 1; *Re Duke of M. and Queen Anne's Bounty*, 1897, 1 Ch. 712; *Re Lord Stafford's Settlement & Will*, 1904, 2 Ch. 72.

(iii.) In payment for any improvement authorized by this Act:

Improvements.

See ss. 25 & 26 and notes thereto; S. L. A., 1887; S. L. A., 1890, ss. 13 & 15 and notes thereto; Housing of the Working Classes Act, 1890, s. 74 (1) (*b*), *inf.*, ch. vii.

A power to make improvements out of income will not prevent the application of capital moneys for that purpose: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's S. E.*, 56 L. T., 484; *Re Sudbury and Poynton Estates*, 1893, 3 Ch. 74; and see *Re Thomas*, 1900, 1 Ch. 319; *Secus*, where there is a trust: *Re Partington*, 1902, 1 Ch. 711.

As to capital money arising from land in Ireland being applicable for improvement of land in England subject to the same limitations, see *Re Eyre Coote*, 81 L. T. 535; W. N., 1899, 222.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

Purchase of reversion

It has been suggested as a consequence that, on a purchase under this subs., the leasehold interest must vest in the first tenant in tail who attains twenty-one, while the reversion in fee devolves on the issue in tail or next remainderman. But the ordinary trust declared of settled leaseholds is such as will correspond with the uses of the freeholds as nearly as the different tenure and rules of law will allow. The best mode of complying with this trust is to surrender the term, not to keep it on foot. Further, this trust may properly be treated as making the term attendant on the inheritance of an immediate reversion when purchased, thereby causing the term to cease.

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

See s. 24, *inf.*

Equity of redemption.

An equity of redemption ought not to be purchased: *Re Earl Radnor's S. E.*, W. N., 1898, 174; and see *Worman* v. *W.*, 43 Ch. D. 296.

Leaseholds where reversion subject to settlement.

It is conceived that under this subs. leasehold land the reversion of which is subject to the settlement can be purchased and the term extinguished; though it seems to have been thought necessary to deal separately with the converse case, see subs. (vi).

The cases on the Lands Clauses Act are not to be applied to this s.: *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252, 257.

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled

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land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

Purchases are made by the direction of the tenant for life, if any competent to act. He is the person to contract, and s. 42 frees the trustees from all liability for adopting his contract. They are not bound to inquire as to the propriety of the purchase or answerable for the title, nor for the conveyance if it purports to convey the land in a proper manner.

Subss. vii. and viii. do not apply to capital money arising under settlement by conveyance on trust for sale unless the application is authorized by the settlement: see s. 63 (2) (ii.).

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

Payment out of Court to trustees.

S. L. A. trustees are "persons empowered to give an absolute discharge" within ss. 21 (ix.), 40. This principle has been acted on in the case of money in Court under the Lands Clauses Act (*Re Hobson*, 7 Ch. D. 708), which only authorizes payment to a person absolutely entitled, and does not contain the words "empowered to give an absolute discharge." The authority of *Re Hobson* was doubted in *Re Smith*, 40 Ch. D. 386; it was considered clear that the payment out could be made under this Act (presumably under subs. ix. of this s. or s. 32 or both taken together), but it is a discretionary power, and in the particular case the Court declined to order payment on the ground of certain persons not being properly represented. See also *Re Wootton* W. N., 1890, 158; *Re Morgan*, 1900, 2 Ch. 474; *Re Sheffield Corporation*, W. N., 1902, 219. Money will be paid out to trustees of a settlement of property inalienably entailed: *Re Bolton Estates Act*, W. N., 1885, 90.

Payment to persons having power to appoint.

Payment will be made to persons having a joint power of appointment without requiring them to make an appointment: *Re Winstanley*, 54 L. T. 840; W. N., 1886, 92.

And, as to payment to tenant for life and remainderman, jointly, see *Anson* v. *Potter*, 13 Ch. D. 141.

Payment to tenant in tail.

Payment will not be made to a tenant in tail; he must execute a disentailing assurance: *Re Reynolds*, 3 Ch. D. 61; and file an affidavit of no incumbrances: *Thornhill* v. *Milbank*, 12 W. R. 523; *Williams* v. *Ware*, 57 L. J. Ch. 497.

Payment to tenant for life.

Where a contract for sale was made by a tenant for life which contemplated payment into Court under the Lands Clauses Acts, but for convenience title was made under this Act and the purchase money paid to S. L. A. trustees, Stirling, J., held that this did not oust the jurisdiction of the Court to allot part of the money to the tenant for

life under the Lands Clauses Act, 1845, s. 73: *Re Scott's Settlement*, Reg. Lib. 1899, S. No. 530, and compare *Re Iever's Settlements*, 1904, 1 Ir. R. 492, cited in note to S. L. A., 1884, s. 7.

Trustees may be appointed abroad to receive money required to be sent there: *Re Lloyd*, 54 L. T. 643; *Re Simpson*, 1897, 1 Ch. 256; but see *Re Freeman*, 37 Ch. D. 148.

Sending money abroad or to colonies.

Application for payment of a sum not exceeding £1000 should be by summons in Chambers; R. S. C., O. LV., r. 2 (2). But see *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541. As to sums exceeding that amount, see Ch. VIII., r. 2, note, *inf.*

Small sums.

For orders under this Act directing payment out to trustees of money paid in on a compulsory purchase, see *Re Wright*, 24 Ch. D. 662; *Re Harrop*, *ib.* 717; *Re Duke of Rutland's Settlement*, 31 W. R., 947; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576; *Re Wootton*, *sup.*; *Re Belfast Improvement Acts*, 1898, 2 Ir. R. 1; and see S. L. A., 1890, s. 14.

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

Costs of sale, &c.

Tenant for life's charges.

Abortive sale.

As to what costs may be paid under this subs., see *Re Beck*, 24 Ch. D. 608; *Re Jones*, 26 *ib.* 736, 744; *Re Llewellin*, 37 *ib.* 317; *Re Rudd*, W. N., 1887, 251; *Re Maryon-Wilson's S. E.*, 1901, 1 Ch. 934; and what may not, *Re Rudd*, *sup.*; *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338; S. C. on appeal, 41 Ch. D. 375 (costs of tenant for life's incumbrancers); *Re Eyton*, W. N., 1888, 254; *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 89, 90; and with *Re Maryon-Wilson*, *sup.*, compare *Re Leveson-Gower's S. E.*, 53 W. R. 524; 1905, 2 Ch. 95. Costs of an abortive sale were allowed in *Re Smith's S. E.*, 1891, 3 Ch. 65; and see *Re Llewellin*, *sup.*, where the sale for which the costs were incurred was not effected. Costs on the higher scale were allowed in *Re Chaytor*, 25 Ch. D. 651, 655. As to costs of several persons constituting tenant for life, see *Smith* v. *Lancaster*, 1894, 3 Ch. 439. As to the costs of proceedings for the recovery or protection of settled land, see s. 36.

See also ss. 46 (6), 47, *inf.*

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Direction of tenant for life as to investment.

Every investment, or other application of capital money, must be made by the direction of the tenant for life, if any competent to act (s. 22 (2) (3)), and investments cannot be varied without his consent (*ib.* (4)), and his assignee (if any) must also consent, s. 50 (3) (4). The sale of settled land can no longer be taken in any case to be for

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the purpose only of investment of the proceeds in the purchase of other land to be settled to the same uses. See *Mortlock* v. *Buller*, 10 Ves. 309.

As to applying proceeds of sale under a power of sale in building, see *Vine* v. *Raleigh*, 1891, 2 Ch. 13; *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252.

Building.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

Payment out to trustees of money paid in.

It was decided (*Cookes* v. *Cookes*, 34 Ch. D. 498), that a tenant for life consenting to the payment of capital money into Court had exercised the option given by this subs., and that the money must remain there and be invested and applied by the Court. But see now S. L. A., 1890, s. 14; compare s. 55 (1), *inf.*

There must be trustees of the settlement in existence, else the option for payment into Court cannot be exercised: *Hatten* v. *Russell*, 38 Ch. D. 334, 345; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382; *Re Fisher and Grazebrook*, 1898, 2 Ch. 660; but a sale can be made under s. 60, though there are no trustees: *Re Dudley*, 35 Ch. D. 338, 344.

In *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531, money was paid into Court to the credit of an action for execution of the trusts of a settlement.

As to distinction between "investment" and "application," see *Re Duke of Marlborough*, 32 Ch. D. 1, 5, 6, 10.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

There are no limitations on the directions of the tenant for life, except those imposed by the Act itself: *e.g.* by ss. 21, 53; see *Re Lord Coleridge's Settlement*, 1895, 2 Ch. 704; but upon an investment the trustees may select their own broker: *Re Duke of Cleveland's S. E.*, 1902, 2 Ch. 350; and they are not bound to invest on mortgage, unless satisfied that the direction of the tenant for life was given upon

a proper investigation of title, a proper report as to value and proper advice as to the form of the mortgage: *Re Hotham*, 1902, 2 Ch. 575. How far this decision applies to other investments, *qu.* see S. C., 1901, 2 Ch. 790, 793.

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(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

As to the regard to be paid, by the trustees or by the Court, to the directions or wishes of the tenant for life, for purposes of subs. 2, 3, and 4, see *Clarke* v. *Thornton*, 35 Ch. D. 307; and the cases cited on subs. 2 *sup.*; and compare *Re Keck's Settlement*, 1904, 2 Ch. 22.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

What is the settlement?

The settlement, at the time when the capital money arises, will not include the will of the tenant for life appointing the estates under a special power: *Beddington* v. *Baumann*, 1903, A. C. 13.

Bona vacantia.

By virtue of this subs. the Crown will take the proceeds of sale of land which, if unsold, would have escheated: *Re Bond*, 1901, 1 Ch. 15.

Whether capital money is equitably converted.

This subs. is a statutory direction that capital money arising under the Act shall devolve as land, but there are no express words operating to create the ordinary equitable conversion into land by directing the money to be laid out in the purchase of land to be settled. The land having been sold, the proceeds necessarily, by operation of the general principle of equity, become liable to be re-invested in land of the same kind to be settled in like manner as the land sold, and this subs. is merely supplementary to that general principle. If, for instance, the land sold were leasehold, the proceeds continue liable to vest in the first tenant in tail who attains twenty-one, unless and until invested in the purchase of fee simple land, by which the line of devolution would be changed. This view is in accordance with the case of *Re Duke of*

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Proceeds of heirlooms.

Marlborough, 32 Ch. D. 11, 13, in which it was held that the proceeds of the sale of heirlooms, notwithstanding s. 37 (2), retained their original quality, and were personal estate until invested in land. The point is of importance in framing settlements of money to be invested in land. If a direction that the money shall "be held and applied as capital money arising under the S. L. A. from the settled land," does not operate as an equitable conversion into land, then it merely makes the money devolve as land as nearly as the law permits, and the money will vest absolutely in the first tenant in tail unless a clause is added expressly directing an investment in the purchase of land. By statute only, but not by trust or contract, money may be made to devolve as land though not equitably converted: compare *Rich* v. *Whitfield*, 2 Eq. 583. If there is an equitable conversion the money is in equity entailed land, and the absolute interest can only be acquired by a bar of the entail: compare *Hyett* v. *Mekin*, 25 Ch. D. 735; *A. G.* v. *Marq. of Ailesbury*, 12 App. Ca. 672.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

It is conceived that the conversion like an investment or other application is to be made according to the direction of the tenant for life, or otherwise as in subs. 2, *sup.*; compare *Re Lord Stafford's Settlement & Will*, 1904, 2 Ch. 72, where subs. 7 of this s. does not seem to have been referred to.

The capital money to be invested or applied under this s. is the residue (if any) after payment of claims properly payable thereout under s. 21.

The consent of the assignee of the tenant for life is necessary to the investment or application: see s. 50 (3).

As to capital money arising from sale of a lease or other estate or interest less than the fee simple, or of a reversion, see s. 34.

See, for form of summons for payment into Court under this s., Forms IX.–XI., Chap. VIII., *inf.*; and for forms of orders, Seton, 6th ed., 1830, 1837.

Investment in land in England.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

England includes Wales and Berwick-on-Tweed in Acts of Parliament (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

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Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

As to land bought with proceeds of sale of heirlooms, see *Re Duke of Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712, where it was held that such land did not become subject to family charges on the settled lands.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

Estates not capable of creation by settlement.

See, on this subs., *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 93.

Where the money arises from an estate inalienably entailed (see s. 58 (1) (i.)), or from an estate where the tenant in tail in remainder has barred his estate tail and converted it into a base fee, there seems no doubt that this subs. gives a statutory authority to create the corresponding inalienable estate tail or base fee in land purchased with the proceeds of sale; and see *Re Bolton Estates Act*, W. N., 1885, 90. The same point arises under the Lands Clauses Consolidation Act, 1845, s. 69.

As to duplication of charges, see *Hindle* v. *Taylor*, 5 De G. M. & G. 577; *Trew* v. *Perpetual Trustee Co.*, 1895, A. C. 264.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

The last words of this subs. are the usual words in the common form, but were not contained in the corresponding clause in Lord

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Cranworth's Act (23 & 24 Vict. c. 145, s. 4). Their absence made that clause objectionable, the vesting being merely negatived, so that on the death under age of the first tenant in tail, he was simply excluded, and the leaseholds reverted to the settlor: *Gosling* v. *Gosling*, 1 De G. J. & S. 16; *Christie* v. *Gosling*, L. R., 1 H. L. 279; 1 Jarm. Wills, 5th ed., 237, n. (*b*). The last words of this subs. carry the leaseholds with the freeholds to the next issue in tail or the next tenant in tail by purchase if he attains twenty-one, and if not, through all tenants in tail by purchase till one does attain that age.

Fines.

Fines and fees payable on the admission of new trustees to settled copyholds must be borne by the tenant for life and the remaindermen in proportion to the value of their respective interests: *Re Bullock's S. E.*, 91 L. T. 651; Seton, 6th ed., 1775.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

See note to s. 5.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

See *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 93; *Re Duke of Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712; and S. L. A., 1890, s. 11.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

VII.—IMPROVEMENTS.

Improvements with Capital Trust Money.

Improvements with Capital Trust Money.

Description of improvements authorized by Act.

25.—Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

This s. as extended by ss. 13 & 18 of the S. L. A. 1890, and s. 74 of the Housing of the Working Classes Act, 1890, forms an exhaustive and complete code; see *Re Blagrave's S. E.*, 1903, 1 Ch. 560, 564. The Court has no jurisdiction to authorize capital money to be applied in improvements not specified in this code, except by way of actual salvage, see *Re De Teissier's S. E.*, 1893, 1 Ch. 153, 165; *Re Montagu*, 1897, 1 Ch. 685; 2 Ch. 8; *Re Hawker*, 41 Sol. J. 333; *Re Willis*, 1902, 1 Ch. 15; *Re Legh's S. E.*, 1902, 2 Ch. 274. S. 21 (vii.) of this Act does not have the effect of incorporating the decisions on the Lands Clauses Act, 1845, and the S. E. A., as to the application of money liable to be invested in the purchase of land in erecting or adding to buildings, see *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252.

(i.) Drainage including the straightening, widening, or deepening of drains, streams, and water-courses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

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IMPROVEMENTS.

Improvements with Capital Trust Money.

Dwellings for working classes.

(x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:

"Cottages *for*," &c.: compare *London County Council* v. *Davis*, 42 Sol. J. 115.

By the Housing of the Working Classes Act (53 & 54 Vict. c. 70), s. 74 (i.), (b.), this s. is extended to dwellings for the working classes, see Chap. VII. *inf.*; also S. L. A. 1890, s. 18; and *Re Calverley's S. E.*, 1904, 1 Ch. 150.

(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:

Cottages and farm buildings.

Silos.

As to the improvements authorized by this and the preceding subs., see *Re Lord Gerard's S. E.* 1893, 3 Ch. 252; and *Re De Teissier's S. E.*, 1893, 1 Ch. 153. As regards silos erected by a tenant for life on land in his own occupation, see *Re Broadwater*, 54 L. J. Ch. 1104; 33 W. R. 738—decided in 1885—when they were experiments. They are, however, an improvement in which capital money under this Act is authorized to be laid out by the Agricultural Holdings Act, 1883, see the reference to it at the end of this s.

(xii.) Saw-mills, scutch-mills, and other mills, water wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

See also Limited Owners Reservoirs &c. Act, 1877; *Re Gaskell's S. E.*, 1894, 1 Ch. 485, 488; *Re Orwell Park Estate*, W. N., 1894, 135.

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

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(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

Cricket ground.

The cost of laying out arable land as a cricket ground was allowed under subs. xvii., but not that of a pavilion in connexion therewith under subs. xviii.: *Re Orwell Park Estate*, 48 Sol. J. 193.

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Reconstruction, enlargement, or improvement of any of those works.

The Court will take a business-like view of this s., and determine in each case whether the work is in the nature of a permanent improvement or a mere repair: *Re Tucker's S. E.*, 1895, 2 Ch. 468.

See, as to subs. xx., *Re Mundy's S. E.*, 1891, 1 Ch. 399; *Re Calverley's S. E.*, 1904, 1 Ch. 150; and compare, for extent of subs. xx., the Universities and College Estates Act, 1898, sched. 3, xxiii.

Mansion.

For further improvements authorized, see S. L. A., 1890, s., 13, *inf.*, which include the rebuilding of a mansion-house.

Improvement of Land Act.

S. 9 of the Improvement of Land Act, 1864, is in many respects less extensive than this s., but includes in subs. 10 "bridges . . . which will increase the value of any lands for agricultural purposes," which are not mentioned in this s. Otherwise it seems to be in no respect more extensive than this s. (see *Re Newton's S. E.*, W. N., 1890, 24), and by s. 30, *inf.*, it is extended so as to comprise the improvements authorized by this Act. But by the Limited Owners' Residences Acts, 1870 & 1871, the Improvement of Land Act, 1864, is extended to cover improvements which are not within the S. L. A.'s, viz. erecting a mansion-house; improving and adding to a mansion-house already erected, or a house capable of being converted into a mansion-house.

As to the adoption by the Court for purposes of this Act, of the sanction given by the Commissioners, under words in the Act of 1864 identical with those of this Act, to certain improvements, see *Re Verney's S. E.*, 1898, 1 Ch. 508.

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Cases on improvements.

As to the effect of a power or trust to make improvements out of income, see n. to s. 21 (iii.), *sup.*, and cases there cited.

As to experiments, which may, or may not, be improvements, see *Re Broadwater Estate*, 33 W. R. 738; 54 L. J. Ch. 1104.

As to what improvements are, or are not, authorized under this s. and S. L. A., 1890, s. 13, *inf.*, see (*a*) *Re Houghton* [but *qy.* if this decision was not under the general jurisdiction, as to which see *Re De Teissier's S. E.*, 1893, 1 Ch. 153, and (*g*), *inf.*], 30 Ch. D. 102; (*b*) *Re Bethlehem & Bridewell Hospitals*, *ib.* 541; (*c*) *Re Duke of Marlborough's Settlement*, 8 T. L. R. 201; (*d*) *Re Newton's S. E.*, W. N., 1889, 201; *ib.* 1890, 24; (*e*) *Re Mundy's S. E.*, 1891, 1 Ch. 399; (*f*) *Re Millard's S. E.*, 1893, 3 Ch. 119; (*g*) *Re Lord Gerard's S. E.*, *ib.* 252; (*h*) *Re Walker's S. E.*, 1894, 1 Ch. 189; (*i*) *Re Gaskell's S. E.*, *ib.* 485; (*j*) *Re Orwell Park Estate*, W. N. 1894, 135; (*k*) *Re Lytton's Will*, 38 Ch. D. 20; (*l*) *Re Tucker's S. E.*, 1895, 2 Ch. 468; (*m*) *Re Verney's S. E.*, 1898, 1 Ch. 508; (*n*) *Re Thomas*, 1900, 1 Ch. 319; (*o*) *Re Wright's S. E.*, 83 L. T. 159; (*p*) *Stanford* v. *Roberts*, 1901, 1 Ch. 440; (*q*) *Re Earl of Lisburne's S. E.*, W. N., 1901, 91; (*r*) *Re Freake's Settlement*, 1902, 1 Ch. 97; (*s*) *Re Legh's S. E.*, 1902, 2 Ch. 274; (*t*) *Re Clarke's Settlement*, *ib.* 327; (*u*) *Re Blagrave's S. E.*, 1903, 1 Ch. 560; (*v*) *Standing* v. *Gray*, 1903, 1 Ir. R. 49; (*w*) *Re Calverley's S. E.*, 1904, 1 Ch. 150; (*x*) *Re Orwell Park Estate*, 48 Sol. J. 193; (*y*) *Re Kensington S. E.*, 21 T. L. R., 351; (*z*) *Re Leveson-Gower's S. E.*, 53 W. R. 524; 1905, 2 Ch. 95.

The following improvements appear to be authorized under the above cases.

[*Note.*—The Roman numerals refer to the subss. of s. 25, and the letters to the above cited cases.]

(1.) New system of drainage for mansion: (*a*); (i.); (iii.); but see (*l*).

(2.) Sea walls, to improve land for building purposes: (*b*); (iv.); (v).

(3.) Roads for prospective building estate: (*f*); (viii.).

(4.) Cottages: (*a*); (*d*); (*q*); (x.); and farm buildings: (*q*); (xi.).

(5.) Building Agent's house, in the nature of a farmhouse: (*a*); (*g*); (x.); (xi.).

(6.) Re-roofing farmhouse: (*d*); farm buildings: (*m*); (xi.).

(7.) Water-supply for mansion, and for building estate; (*a*); (*i*)—at p. 488—(*j*); (*k*); (*y*); and for farms (*l*); (xiii.).

(8.) Sewers for prospective building estate: (*f*); (xviii.).

(9.) Cricket ground in connexion with building estate: (*x*); (xvii.).

(10.) Erection of engine and pumps for open mines: (*e*); (xix.); (xx.).

(11.) Re-arrangement of main entrance to house: (*i.*); S. T. A., 1890, s. 13 (ii.).

(12.) Re-roofing of house, where old roof was worn out: (*i*); S. L. A., 1890, s. 13 (ii.).

(13.) Structural drainage works and sanitary additions to houses: (*n*); (*v*); (*w*); S. L. A., 1890, s. 13 (ii.).

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(14.) New block floor over concrete to keep dry rot out of basement: (*p*); S. L. A., 1890, s. 13 (ii.).

(15.) Substantial re-building of mansion: (*h*); (*s*); S. L. A., 1890, s. 13 (iv.); but see (*o*).

(16.) New fences: (*m*); (*z*); (vi.).

(17.) Rebuilding stables: (*a*); (*l*); but see (*g*); (*q*.)

The following improvements appear to be unauthorized.

(1.) Re-roofing, not being a permanent improvement: (*d*.); (xi.).

(2.) Re-construction of stone wall fences dividing fields: (*c*); (vi.); (xx.).

(3.) Chapel: (*g*).

(4.) Residential house for land agent: (*g*); S. L. A., 1890, s. 13 (ii.).

(5.) Heating apparatus for mansion: (*i*); S. L. A., 1890, s. 13 (ii.).

(6.) New stables for mansion, where original stables were in fair repair: (*g*); and see (*q*); S. L. A., 1890, s. 13 (iv.); but see (*a*); (*l*).

(7.) Architectural improvements of mansion: (*g*); S. L. A., 1890, s. 13 (iv.); and see note to s. 21 (vii.), *sup*.

(8.) Sanitary works in mansion: (*l*).

(9.) Electric light installation: (*t*); (*u*); not following (*r*); S. L. A., 1890, s. 13 (ii.).

(10.) Engine house for electric light apparatus at some distance from mansion: (*u*); S. L. A., 1890, s. 13 (ii.).

(11.) New glass-houses: (*z*); S. L. A., 1890, s. 13 (ii.)

By the Agricultural Holdings (England) Act, 1883, s. 29, it is enacted as follows:— 46 & 47 Vict. c. 61.

29. . . "Capital money arising under the S. L. A., 1882, may be applied in payment of any moneys expended, and costs incurred by a landlord *under or in pursuance of this Act* in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto, as for an improvement authorized by the said S. L. A.; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the said S. L. A. to be discharged out of such capital money."

"The schedule hereto" means the First Schedule to the Act, and was repealed by the Agricultural Holdings Act, 1900, which enacted as follows:— 63 & 64 Vict. c. 50.

1.—(2.) References in the principal Act to the First Schedule to that Act shall be construed as references to the First Schedule to this Act.

3.—(3.) Sections twenty-nine, thirty, and thirty-one of the principal Act shall apply to any money paid by or due from a landlord to a tenant as compensation for any

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improvement comprised in the First Schedule to this Act, whether the compensation be claimed under this Act or under custom or agreement or otherwise.

The First Schedule to the Act of 1900 is as follows :—

PART I.

Improvements to which consent of landlord is required.

(1.) Erection, alteration, or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.
(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making or removal of permanent fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Protecting young fruit trees.
(13.) Reclaiming of waste land.
(14.) Warping or weiring of land.
(15.) Embankments and sluices against floods.
(16.) The erection of wirework in hop gardens.

N.B.—*This part is subject as to market gardens to the provisions of Part III.*

PART II.

Improvements in respect of which notice to landlord is required.

(17.) Drainage.

PART III.

Improvements in respect of which consent of or notice to landlord is not required.

(18.) Chalking of land.
(19.) Clay-burning.
(20.) Claying of land or spreading blaes upon land.
(21.) Liming of land.
(22.) Marling of land.
(23.) Application to land of purchased artificial or other purchased manure.
(24.) Consumption on the holding by cattle, sheep, pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding stuff not produced on the holding.

(25.) Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn proved by satisfactory evidence to have been produced and consumed on the holding.

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(26.) Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy.

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(27.) In the case of a holding as to which section three of the Market Gardeners' Compensation Act, 1895, applies—

58 & 59 Vict. c. 27.

(i.) Planting of standard or other fruit trees permanently set out;
(ii.) Planting of fruit bushes permanently set out;
(iii.) Planting of strawberry plants;
(iv.) Planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years;
(v.) Erection or enlargement of buildings for the purpose of the trade or business of a market gardener.

S. 31 (v.) of this Act (S. L. A.) enables a tenant for life to make binding contracts in regard to improvements authorized by it.

Contracts.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Approval by Land Commissioners of scheme for improvement and payment thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees

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and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

The Land Commissioners are now the Board of Agriculture and Fisheries: see Board of Agriculture Act, 1889, s. 2; Board of Agriculture and Fisheries Act, 1903.

This s. gives the tenant for life a choice of three modes in which he may obtain a sanction to expenditure, so as to enable the amount to be paid out of capital, and so as to free the trustees from responsibility if the payment is to be made by them. A certificate of (1) the Board, or (2) a competent engineer or able practical surveyor, that the work has been properly executed, and what amount is payable, or (3) an order of the Court authorizing payment. Under any of these three authorities trustees will be safe in paying the amount mentioned in the certificate or order to the tenant for life, or as he may direct, he being the person who procures the execution of the work.

Where an application is made to the Court for an order under subs. 2 (iii.) the duties of the Court are not merely ministerial. It must be satisfied by evidence that the scheme is a proper one: *Re Keck's Settlement*, 1904, 2 Ch. 22.

Prospective order.

Scheme.

An order will not be made under subs. (2.) (iii.) unless capital moneys are actually in hand: *Re Millard's S. E.*, 1893, 3 Ch. 116; disapproving the order in *Re Houghton*, 30 Ch. D. 102; see also, *Re Marquis of Bristol's S. E.*, 1893, 3 Ch. 161: but where improvements are required, and there is no money in hand, the tenant for life should submit a scheme to the trustees; and they will be justified in repaying him when capital money comes into their hands: *Re Duke of Norfolk's Parliamentary Estates*, 1900, 1 Ch. 461. He is less likely to be repaid, if he submits no scheme, and applies, when money comes in, under S. L. A., 1890, s. 15: *Re Tucker's S. E.*, 1895, 2 Ch. 468. And though the Court will not make a prospective order approving a

scheme, it will decide the legal question whether the proposed improvements are within the Act, though at the time there is no capital money in hand: *Re Calverley's S. E.*, 1904, 1 Ch. 150.

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The result of this s. seems to be that where capital money is in the hands of trustees, any scheme for its application in improvements must be approved by them; but if they refuse s. 44 appears to give an appeal to the Court. If the money is in Court, then by subs. 3 the scheme must be approved by the Court. Formerly it had to be approved before the works were commenced: *Re Hotchkin*, 35 Ch. D. 41; *Re Broadwater Estate*, 33 W. R. 738: but see now S. L. A., 1890, s. 15, *infrà*. Extra expenditure incidental to the scheme was allowed in *Re Lytton*, 38 Ch. D. 20. Whether the cost of improvements on lands sold can be paid after sale seems doubtful: *Re Hotchkin*, 35 Ch. D. 41; compare *Re Howard's S. E.*, 1892, 2 Ch. 233, 243.

Extra cost.

Payment after sale.

The Court will not hear counsel for the trustees in support of an application by the tenant for life whose interest is opposed to that of the remainderman: *Re Hotchkin, ubi sup.; Re Broadwater Estate*, 33 W. R. 738; but trustees taking different sides were heard and allowed separate costs in *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 548. As to costs of scheme, see *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 97. Where there are no trustees and the tenant in tail, who is before the Court, does not require them to be appointed, the Court will act under this s. without them, and, in acting, will pay regard to the wishes of the tenant for life: *Clarke* v. *Thornton*, 35 Ch. D. 316.

Costs.

The trustees have power to prepare and approve schemes during a minority: *Re Greys Court Estate*, 45 Sol. J. 344; W. N., 1901, 60; and see s. 60, *inf.*

Infant.

This s. is not retrospective: *Re Knatchbull's S. E.*, 27 Ch. D. 349; 29 *ib.* 588.

Not retrospective.

For forms of summonses under this s., see Forms XII., XIII., XV., and XVI., Chap. VIII., *inf.*, and for the nomination of an engineer or surveyor, see Form XIV.; and of Orders, Seton (6th ed.), 1845, 1846.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Concurrence in improvements.

See *Re Orwell Park Estate*, W. N., 1894, 135.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the

Obligation on tenant for life and successors to maintain, insure, &c.

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foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

"Trees": the restriction is not limited to "*timber* trees."

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

See S. L. A., 1887, s. 2.

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Compare the Improvement of Land Act, 1864, ss. 32–34; and the Agricultural Holdings (England) Act, 1883, ss. 41, 42.

But for this s., an equitable tenant for life (see *Taylor* v. *Taylor*, 20 Eq. 297; *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297) would not be free to enter and execute improvements. Also, the improvements might be such as, apart from the s., a tenant for life impeachable for waste could not execute.

As to the words "planted or left standing for shelter or ornament," see *Weld-Blundell* v. *Wolseley*, 1903, 2 Ch. 664.

Improvement of Land Act, 1864.

Extension of 27 & 28 Vict. c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

See n. to s. 25, *sup.*, "Improvement of Land Act."

Where improvements authorized by the Improvement of Land Act, 1864, are not within the S. L. A., capital money is not applicable thereto under the S. L. A.: *Re Verney's S. E.*, 1898, 1 Ch. 508, 511.

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CONTRACTS.

Power for tenant for life to enter into contracts.

VIII.—CONTRACTS.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

In this s. enfranchisement is not mentioned. It is included in the term sale by force of s. 3 (ii.), which authorizes the tenant for life "to sell, &c., so as to effect an enfranchisement." See also subs. (vi.), *inf.*

For regulations respecting sales, &c., see s. 4.

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

See also s. 12, *sup.*

The consideration paid under this subs. for varying the terms of a lease would be income: see *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 660.

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

As to the terms on which a tenant for life may accept a surrender of a lease, see s. 13.

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

Contracts.

Under this subs. a tenant for life may contract, and, where competent to act, he is the proper person to contract, as well as to direct investments of capital money. By s. 42 the trustees are freed from all responsibility in adopting any contract made by the tenant for life on a purchase, exchange, partition, or lease. As to investments, see s. 22 (2), *sup.*, and n. thereto.

Notice to S. L. A. trustees.

As to notice of the contract under s. 45, see *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616; *Hughes* v. *Fanagan*, 30 L. R. Ir. 111.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

See on this subs. *Re Duke of Cleveland's S. E.*, 1902, 2 Ch. 350, 353.

Contracts prior to settlement.

S. 6. of S. L. A., 1890, extends the power to perform contracts, to contracts having priority to the settlement.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof.

Jurisdiction.

As to the jurisdiction under this subs. over third parties, see *Re Ailesbury's S. E.*, 42 W. R. 45.

For form of application under this subs., see Form XVII. Chap. VIII., *inf.*; and for forms of Order, see Seton, 6th ed., 1817, 1837.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or

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CONTRACTS.

evidence of the title of any person to the lease, or to the benefit thereof.

Contracts by tenant in tail.

The contract under this Act of a tenant in tail has the same effect as that of a tenant for life (see s. 58 (1) (i.)) and binds the successor, notwithstanding that the ordinary contracts of a tenant in tail do not so bind. The ordinary contract if binding would defeat the successor's title in like manner as the contract of an owner in fee simple (see *Davis* v. *Harford*, 22 Ch. D. 128), but under this Act the contract enures for the benefit of the successor.

This s. renders an intending purchaser or lessee or other person contracting with the tenant for life under the powers given by the Act, perfectly safe as regards performance of the contract. Every successor of the contracting tenant for life will be bound and liable to perform the contract in the same way as that tenant for life himself: but a contract which does not comply with the requirements of the Act is of course no more binding than a completed transaction which does not: see s. (55) (3), *inf.*, *and Hughes* v. *Fanagan*, 30 L. R. Ir. 111.

IX.—MISCELLANEOUS PROVISIONS.

MISCELLANEOUS PROVISIONS.

Application of money in Court under Lands Clauses and other Acts.

8 & 9 Vict. c. 18.

23 & 24 Vict. c. 106.

32 & 33 Vict. c. 18.

40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

"Liable": see n. to next s.

Compare Universities and College Estates Act, 1898, s. 6.

This s. enables money in Court under the Lands Clauses Acts and other similar Acts to be applied in like manner as money arising from

a sale under this Act. The company by whom the money is paid in will be liable to pay the costs of the application and of the disposal of the money in like manner as they are liable to pay the cost of reinvestment in land or of any other disposal of the money authorized by the Act under which the money is paid in, including an investment in debenture stock under s. 21 of this Act: *Re Hanbury's Trusts*, 31 W. R. 784; W. N. 1883, 116; and are also liable to pay the costs of a petition to amend a scheme for expenditure upon improvements: *Re Sanders*, 38 Sol. J. 478; and see Seton, 6th ed., 1845, Form 2; *Re Bethlehem & Bridewell Hosp.*, 30 Ch. D. 541; but not the costs of obtaining an order appointing trustees for the purposes of the S. L. A.'s: *Re Waterford & Limerick Ry. Co.*, 1896, 1 Ir. R. 507.

Costs of application or investment of money in Court.

Notwithstanding this s. Kay, J., would not dispense with the examination of a married woman on an application under s. 50 of the S. E. A.: *Re Arabin's Trusts*, 52 L. T. 728; W. N., 1885, 90; but see *Re Ward's S. E.*, W. N., 1895, 41. But no examination is necessary where she comes within the M. W. P. A.: *Riddell* v. *Errington*, 26 Ch. D. 220; *Re Harris*, 28 *ib.* 171; *Re Batts S. E.*, 1897, 2 Ch. 65.

Examination of married woman.

In the cases of *Re Byron's Charity*, 23 Ch. D. 171 (followed in *Re Bethlehem & Bridewell Hospitals*, 30 Ch. D. 541, where however the only question discussed was costs); *Ex p. Jesus College, Cambridge*, W. N., 1884, 37; 32 W. R. 115; *Ex p. Vicar of Castle Bytham*, 1895, 1 Ch. 348; and *Ex p. Corporation of the City of London*, 45 Sol. J. 259, it was held that though charity or ecclesiastical or municipal land sold under the Lands Clauses Act was not "settled" within s. 2 (1) of this Act, yet, reading s. 69 of that Act (within which such land is "settled land," see *Kelland* v. *Fulford*, 6 Ch. D. 491), with this s., the Court had jurisdiction to apply the proceeds in Court of such sale, under this s.

Proceeds of charity land.

Money in Court arising from sale of lands inalienably entailed by a private Act was ordered to be paid out to trustees who had been appointed under s. 38: *Re Bolton Estates Act*, W. N., 1885, 90; and as to payment out to S. L. A. trustees of money paid in on a compulsory purchase, see cases cited in the last n. to s. 21 (ix.), *sup.*

Payment out to S. L. A. trustees.

For payment out to the tenant for life of a small sum lodged in Court as purchase money of lands taken under the Labourers (Ireland) Acts, on his undertaking to expend it in permanent improvements, as if it was capital money under the S. L. A.'s, see *Ex p. Lyle*, 1903, 1 Ir. R. 445; *Ex p. Giveen, ib.* 447.

Labourers (Ireland) Acts.

33. Where, under a settlement, the money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money in hands of trustees under powers of settlement.

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A sinking fund created by the settlement for repayment of moneys raised for improvements is within this s.: *Re Sudbury Estates*, 1893, 3 Ch. 74.

Sinking fund.

This s. should be read with s. 60, *inf.*; the trustees will have discretion during a minority: *Re Duke of Newcastle*, 24 Ch. D. 129, 139; and as to powers independent of the Act, see S. C. See also, as to the option of the tenant for life, *Clarke* v. *Thornton*, 35 Ch. D. 306, 313; *Re Gee*, W. N., 1895, 90; 64 L. J. Ch. 606.

"Option."

Money in Court.

"In the hands of trustees": the s. applies, though the money be in fact in Court, and there are no trustees: *Clarke* v. *Thornton*, *sup.*, 314.

"Liable" to be laid out.

"Liable," *i.e.* whether under a positive direction, or a mere power: *Re Hill*, 1896, 1 Ch. 962; *Re Soltau*, 1898, 2 Ch. 629; and see *Re Thomas*, 1900, 1 Ch. 319, 323.

Money bequeathed to be invested in land.

This s. makes the powers given by the Act, as to disposal of capital money, applicable to all money in the hands of trustees liable to be laid out in land, whether before or after the commencement of the Act; and though s. 2 (1) defines "settlement" as an instrument by which "land stands limited," &c., it is not material that the money did not arise from the sale of land, but was money originally bequeathed in trust to be laid out in the purchase of land to be settled: *Re Mackenzie's Trusts*, 23 Ch. D. 750; *Re Mundy's S. E.*, 1891, 1 Ch. 399; see also *Re Byng's S. E.*, 1892, 2 Ch. 219. This seems in accordance with the old rule that money liable to be laid out in the purchase of land is to be considered as land, therefore a settlement of the money in this manner is to be considered as a settlement of land. The purchase of land may be deferred, and an interim investment made under s. 21 (i.): *Re Maberly*, 33 Ch. D. 455; even in the case of money bequeathed on trust for immediate investment in land: *Re Mackenzie's Trusts*, 23 *ib.* 750; *Re Tennant*, 40 Ch. D. 594 (in which latter case there had been an order made for investment in Consols until the money could be invested under S. E. A., s. 34).

Enlargement of powers.

The effect of this s. is to free all money liable to investment in land from any particular restriction as to the land to be purchased, as, for instance, that it should be in a particular county; see *Re Hill*, 1896, 1 Ch. 962. The power of investment in land is enlarged as well as the power of interim investment or other application (s. 21).

No tenant for life.

This s. has been held to apply though there was no tenant for life: *Re Tesseyman's S. E.*, 42 Sol. J. 96; W. N. 1897, 168.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money,

may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such a manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Where a tenant for life is entitled to the rent of leaseholds for a short term he would be injured by a sale if he only received the income of the proceeds, and where the reversion on a lease is sold he may be benefited. This s. provides for the adjustment of the rights of the tenant for life and remainderman notwithstanding the sale. See on this s., *Re Griffith's Will*, 49 L. T. 161.

Operative only when enforced.

This s. is only put in force either on an application by the trustees or some person interested, or, as to money in Court, when the Court is asked to deal with the money, or income. The trustees are not bound to take any proceeding to prevent a tenant for life taking the whole income of the proceeds of a reversion (see s. 42). But upon a sale of a freehold reversion with ground rents, the proceeds being invested by the trustees in leaseholds, thereby increasing the income of the tenant for life; and the trustees on the application of the remainderman, being willing to exercise their discretion, Chitty, J., held that the Court had jurisdiction under this s.: *Re Bowyer's S. E.*, W. N., 1892, 48. The s. does not seem to apply where the fee simple in possession is sold, and the proceeds invested in leaseholds, s. 21 (viii.); but the transaction might be such as to come under s. 53.

Apportionment between successive owners.

For the principle on which apportionment of the purchase money and income between tenant for life and remainderman is made on a sale of leaseholds for years, see *Re Phillips*, 6 Eq. 250; *Askew* v. *Woodhead*, 14 Ch. D. 27; *Re Hunt's Estate*, W. N., 1884, 181; Seton, 6th ed., 2447-2452; and of reversions on leases, see *Re Wootton*, L. R. 1 Eq. 589; *Re Mette's Estate*, *ib.* 7 Eq. 72; *Re Wilkes*, 16 Ch. D. 597; *Cottrell* v. *C.*, 28 *ib.* 628; *Re Griffith's Will*, 49 L. T. 161; *Re Bowyer's S. E.*, *sup.* On the sale of renewable leaseholds no apportionment was made in *Re Barber*, 18 Ch. D. 624, and the cases there followed. As to apportionment of money paid for minerals severed by a stranger, see *Re Barrington*, 33 Ch. D. 523; *Re Robinson*, 1891, 3 Ch. 129.

For a form of summons for the application of money paid on the sale of a lease or reversion, see Form XVIII. Chap. VIII., *inf.*; and of Order, Seton, 6th ed., 1840. As to service of the application, see r. 4, Chap. VIII.

Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled

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land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

This s. is subject to the prohibition contained in s. 28 (2), *sup.*

As to what is "timber," see *Honywood* v. *H.*, 18 Eq. 306, 308.

"Timber estates."

Before this Act it was necessary for a tenant for life impeachable for waste to commence an action in order to have ripe timber cut under the direction of the Court; but see as to his rights in the case of a "timber estate," *Dashwood* v. *Magniac*, 1891, 3 Ch. 306. The course was to invest the whole proceeds, and give him no part of the capital, but only the income. This s. following the principle as to mineral rents (see s. 11) gives him one-fourth of the capital.

This s. does not enable a tenant for life who is entitled to cut and sell timber for his own use, to receive for his own use the valuation price of uncut timber sold with the estate under this Act: *Re Llewellin*, 37 Ch. D. 317; and see *Cockerell* v. *Cholmeley*, 1 Clark & Fin. 60.

For forms of summons under this s. see Forms VI. and VII., Chap. VIII., *inf.*; and for forms of Orders, Seton, 6th ed., 1833, 1834.

Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

See also s. 47, *inf.*

Costs of actions, &c.

This s. replaces and supplements S. E. A., s. 17, repealed by this Act. See on the repealed s., *Re Twyford Abbey S. E.*, 30 W. R. 268; S. C. *sub. nom. Re Willan's S. E.*, 45 L. T. 745; *Re Earl De la Warr's S. E.*, 16 Ch. D. 587.

In *Re Ormrod's S. E.*, 1892, 2 Ch. 318, it was held that, independently of this s., the Court, under its general jurisdiction, had power to direct payment out of capital money of the costs of successful opposition to bills in Parliament containing provisions injuriously affecting the estate, but, *semble*, not to make the costs a charge on the

estate. But in *Hamilton* v. *Tighe*, 1898, 1 Ir. R. 123, the costs of an action to establish the rights of the tenant for life and trustees to a several fishery were charged on the inheritance, apparently under the general jurisdiction, as this s. was not referred to.

Proceedings in the House of Lords to establish a claim to a Peerage carrying with it the title to land, are within this s.: *Re Earl of Aylesford*, 32 Ch. D. 162.

Lunacy.

As to the powers of the Court in Lunacy in relation to this s., see *Re Blake*, W. N., 1895, 51; and s. 62, *inf.*

For form of order authorizing costs mentioned in this s., see Seton, 6th ed., 1847 (the order in *Re Earl of Aylesford, sup.*).

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

The Court had no jurisdiction to sell heirlooms simply on the ground of convenience: *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.

Sales of heirlooms.

Sales of heirlooms were ordered under this s. in *Re Brown*, 27 Ch. D, 179; *Re Houghton*, 30 *ib.* 102; *Re Duke of Marlborough*, *ib.* 128; 32 *ib.* 1; *Re Rivett-Carnac*, 30 *ib.* 136; *Browne* v. *Collins*, W. N., 1890, 78; 62 L. T. 566; *Re Earl of Radnor's Will*, 45 Ch. D. 402; *Re Townshend's Settlement*, 89, L. T. 691; but refused in *Re Beaumont*, 58 L. T. 916; *Re Hope's Settlement*, 1899, 2 Ch. 691 (note); *Re Fetherstonhaugh*, 42 Sol. J. 198; *Re Hope*, 1899, 2 Ch. 679.

The tenant for life must show that the proposed sale is in the interest of all parties entitled under the settlement, and the fact of his having got himself into difficulties by extravagance will have no weight with the Court: *Re Hope, sup.* If the application is for leave

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to sell an heirloom of unique character and historical repute, the Court will have regard to the intention of the settlor and the wishes of the remaindermen: S. C.

Ex post facto order.

An order, to sanction the sale of heirlooms already sold, will not be made: *Re Ames*, 1893, 2 Ch. 479; but in that case the Court, on the ground that the sale was advantageous, directed the trustees not to take steps for their recovery; and see *Re Smith's S. E.*, 15 December, 1888, S. 2564.

In *Browne* v. *Collins*, *sup.*, where the mansion with which the heirlooms were to devolve was sold, and a new mansion purchased, the Court authorized a sale of some of the heirlooms, and the removal of the others to the new mansion.

The Court has jurisdiction to apply proceeds of sale of heirlooms in the repair of other heirlooms settled by the same instrument: *Re Waldegrave*, W. N., 1899, 240; 81 L. T. 632.

Title of honour.

A dignity or title of honour descending to the heirs general or the heirs of the body, being an incorporeal hereditament, is "land" within the meaning of this s., so that heirlooms settled to go along with it can be sold: *Re Rivett-Carnac*, 30 Ch. D. 136.

Trustees under this s.

A trustee with power of sale of land is a trustee for the purposes of this s.: *Constable* v. *Constable*, 32 Ch. D. 233.

Incumbrances.

Proceeds of the sale of heirlooms may be applied in discharge of incumbrances on the land, and such incumbrances need not be kept on foot for the benefit of an infant remainderman in whom the heirlooms, if not sold, would have vested at twenty-one: *Re Duke of Marlborough*, *sup.*; *Re Lord Stafford's Settlement and Will*, 1904, 2 Ch. 72, where the first tenant in tail in remainder (a female) had a vested but defeasible interest in the heirlooms. But *qu.* whether the Court would authorize this, if the first tenant in tail in remainder had an indefeasibly vested interest in the heirlooms. In *Browne* v. *Collins*, *sup.*, where this was the case, the proceeds of sale of the heirlooms were directed to be paid to a separate account.

Qu. decision in Lord Stafford's Case.

In *Re Lord Stafford's Settlement and Will*, *sup.*, where heirlooms were bequeathed by the will to devolve with land comprised in the settlement, it was held that on a sale of an heirloom, the trustees of the will were the proper persons to receive the purchase money. It is submitted that this decision was clearly wrong. By subs. 2 of this s. the purchase money is made capital money arising under this Act (see s. 2 (9)), hence is payable either to the "trustees of the settlement" or into Court under s. 22 (1). The "trustees of the settlement" in that case were, it is conceived, the trustees of the deed settling the land (see s. 2 (1); (8)); but certainly not the trustees of the will.

It seems that the proceeds of sale of heirlooms, notwithstanding subs. 2 and s. 22 (5), retain their original quality, and are personal estate until invested in land: *Re Duke of Marlborough*, 32 Ch. D. 1.

As to family charges, from which heirlooms were free, not attaching on land purchased with proceeds of their sale under this s., see *Re Duke of Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712.

Damages payable by the representatives of a former tenant for life in respect of heirlooms are not capital money arising under the Act: *Re Walton*, 44 Sol. J. 645.

Damages.

As to estate duty attaching on sale of heirlooms of national, scientific or historic interest—which are exempt from duty, during the continuance of the settlement, under s. 20 of the Finance Act, 1896—see that s.

Estate Duty.

For forms of summons under this s., see Forms VI. and VII., Chap. VIII., *inf.*; and of Orders, Seton, 6th ed., 1833–35.

X.—TRUSTEES.

TRUSTEES.

Appointment of trustees by Court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

As to who are trustees of the settlement, see s. 2 (8), *sup.*, and S. L. A., 1890, s. 16 and notes thereto.

The provisions of the T. A. as to appointment of trustees apply to trustees under the S. L. A.'s: see T. A., s. 47.

As the tenant for life's powers are, except in special cases, exercisable without any sanction by the Court, it is conceived that the Court will in every proper case appoint trustees on an application by the tenant for life where there are no trustees originally, or where an appointment cannot be made out of Court; except perhaps where the Court is satisfied that any exercise of the powers is impossible: *Williams* v. *Jenkins*, W. N., 1894, 176. The only duty of the Court will be to see that the persons to be appointed are fit and proper persons; but see *Burke* v. *Gore*, 13 L. R., Ir. 367.

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As to the effect of an order appointing trustees of the settlement created by a will, where the will contains several settlements, see *Re Skerritt*, W. N., 1899, 240.

Several settlements by same instrument.

As to appointing trustees of a compound settlement, see note to s. 2 (1), "Compound Settlement."

Trustees of "Compound Settlement."

Number of trustees.

Single trustee.

There must be at least two trustees unless the settlement authorizes one alone to receive capital money (see ss. 39 and 45 (2)). Where in a settlement before the Act the power of sale is given to the survivor of two or more trustees this will be a sufficient authority: *Re Garnett Orme & Hargreaves*, 25 Ch. D. 595; 32 W. R. 313, as to which case see note to s. 45. In a settlement made after the Act there should, if so desired, be not only an express authority to a sole trustee to act generally for the purposes of the Act, but also an express authority to him to receive capital money arising under the Act.

Who appointed.

Trustees, for purposes of the Act, of settled land in England, and resident there, were appointed, by the Irish Court, trustees for purposes of the Act, of Irish land, settled on the same limitations: *Re Maberly's S. E.*, 19 L. R. Ir. 341; and see *Re Simpson*, 1897, 1 Ch. 256, where trustees in New South Wales were appointed; and compare *Re Freeman's Settlement*, 37 Ch. D. 148; *Re Lloyd*, 54 L. T. 643.

In Ireland trustees were appointed under this s. to enable a sale, where the trustees of the settlement had a power of sale, subject to the consent, not obtainable, of a person other than the tenant for life: *Re Johnstone*, 17 L. R. Ir. 172; but see n. to s. 2 (8).

Irish Land Commission.

As to the powers of the Irish Land Commission to appoint trustees of a settlement for the purposes of the Acts to receive the redemption price of superior interests, see *Re Garde's Estate*, 1904, 1 Ir. R. 237.

A tenant for life may propose for appointment other persons than the original trustees of a will: *Re Nicholas*, W. N., 1894, 165.

Who not appointed trustee.

The Court will not appoint the tenant for life, or a person who might become tenant for life, to be trustee: *Re Harrop*, 24 Ch. D. 717, 719; but see *Tempest* v. *Camoys*, W. N., 1888, 17; nor his solicitor: *Wheelwright* v. *Walker*, 23 Ch. D. 763, though he was so appointed by the settlement: *Re Kemp*, 24 Ch. D. 485; *Re Spencer's S. E.*, 1903, 1 Ch. 75; but see *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 360; nor two persons nearly related to each other: *Re Knowles*, 27 Ch. D. 707; and see *Re Earl of Stamford*, 1896, 1 Ch. 288; *Re Norris*, 27 Ch. D. 333, from which it appears that such appointments, if made out of Court, are not invalid.

Money in Court.

Trustees were appointed under this s. for the purpose of payment out of capital money in Court: *Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop*, *ib.* 717; and see S. L. A., 1890, s. 14.

Application, how made.

As to application for the appointment of trustees and service of the application, see Chap. VII., *inf.*; and for form of summons, see *ib.* Form XIX.

In a proper case, the summons will be ordered to be served on the remainderman, or his assignee: *Wheelwright* v. *Walker*, *sup.*

For Forms of Orders: see Seton, 6th ed., 1825, 1828; *Re Simpson*, 1897, 1 Ch. 256, 259.

And as to the effect of a pending suit relating to the settlement on the power given by this s., see *Re Parry*, W. N., 1884, 43; *Cardigan* v. *Curzon Howe*, 30 Ch. D. 539.

Stamp on appointment.

The Commissioners of Inland Revenue do not require that an appointment of trustees under this s. should bear a 10*s.* stamp where there had previously been no trustee for the purposes of the Act: *Re Potter*, W. N., 1889, 69; but see *Re Kennaway*, *ib.* 70.

Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

Power to give receipt.

In the case of settlements executed before this Act, but after the Act 23 & 24 Vict. c. 145, there may not be an express clause authorizing a surviving or sole trustee to give a receipt, but that Act as to settlements to which it applies, and T. A., s. 20, re enacting C. A., s. 36, as to all settlements, supplies the clause where a sole trustee is authorized to sell and brings the case within this s.: *Re Garnett Orme and Hargreaves*, 25 Ch. D. 595, as to which see note to s. 45; and see T. A., s. 22; S. L. A., s. 38 (2); *Re Earl of Radnor's Will*, 45 Ch. D. 402, 413.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being:

This s. follows the practice of the Court, which does not usually pay out money to a single trustee.

Representative of surviving trustee.

It is conceived that the prohibition against paying to fewer than two applies to the case of a sole personal representative of a surviving trustee (see s. 38 (2)), so that a sole executor or administrator could not give a discharge. The word "representative" in the singular in the next s. applies to the case where the settlement authorizes a sole trustee to act.

Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee for any money or securities, paid or transferred to the trustees,

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trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

See *Pyne* v. *Phillips*, W. N., 1895, 8.

See note to last s. as to the meaning of "representative" in the singular.

This power to give receipts necessarily applies to trustees appointed by the Court under s. 38 (*Cookes* v. *C.*, 34 Ch. D. 498), otherwise no sale could be made except on payment into Court.

As to receipts by agents, see T. A., s. 17.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Compare T. A., s. 24.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper

mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

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The result of the two last preceding ss. seems to be that trustees are free from all responsibility of any kind except to take care of the money paid to them and to see that the investment or application under s. 21 (i.), (ii.), (iii.), (ix.), (x.), and (xi.), of money in their hands is proper (see *Hatten* v. *Russell*, 38 Ch. D. 334, 344). When the money is to be re-invested in land they are expressly exempted from any responsibility as to the propriety of the purchase, the validity of the title, or the form of conveyance if it purports to convey the land in the proper mode. In parting with the purchase-money they have only to see that they pay it, by direction of the tenant for life, to some person who appears to join in the conveyance for some necessary or proper purpose. There ought, therefore, to be no difficulty in procuring trustees for the purposes of the Act. As to a conveyance "in the mode" referred to in this s., see s. 24.

See also n. to s. 22 (2).

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Trustees' reimbursement.

Compare T. A., s. 24.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

Reference of differences to Court.

See as to costs s. 46 (6), *inf.*, and n. thereto.

As to the nature of the differences included in this s., see *Wheelwright* v. *Walker*, 23 Ch. D. 762; *Hatten* v. *Russell*, 38 *ib.* 344.

For form of summons for a declaration under this s., see Form XX., Chap. VIII., *inf.*; and as to service of the summons, r. 4, *ib.*

45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall

Notice to trustees.

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give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

This s. must be read with S. L. A., 1884, s. 5; and S. L. A., 1890, s. 7 (i.).

47 & 48 Vict. c. 18, s. 5.
General notice.

By S. L. A., 1884, s. 5 (which cancels on this point the decision in *Re Ray's S. E.*, 25 Ch. D. 464), the notice may be in general terms except as to a mortgage or charge, and may be waived by a trustee. Notice once given will, it is conceived, continue in force during the whole life of the tenant for life giving it.

"Month" means calendar month: see n. to C. A., s. 2.

Posting is sufficient notice, whether the letter is received or not: *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216.

It is conceived that this s., especially subs. 2, must be read in connexion with s. 39 (2). It is obvious that in settlements before the Act there can be no clause expressly excluding this subs., and that the exclusion (if any) must be by necessary implication. (A remark by Pearson, J., in *Laurence* v. *L.*, 26 Ch. D. 795, 800—a case on the Apportionment Act of 1870—shows how an instrument can, by implication, control the provisions of an Act passed subsequently to its execution.) Accordingly in *Re Garnett Orme and Hargreaves*, 25 Ch. D. 595, an authority to pay money to a surviving trustee was considered by Bacon, V.-C., "a contrary intention" within the meaning of this subs., and many titles must have been accepted on the faith of the correctness of this decision.

Notice in cases under s. 60.

Where, in the absence of trustees, a person has been appointed under s. 60 to act on behalf of an infant, it is not necessary for trustees to

be appointed for the purpose of receiving notices under this s.: *Re Dudley*, 35 Ch. D. 338. And where there are trustees who are acting on behalf of an infant under s. 60, it is not necessary for them to go through the form of giving notice to themselves or their solicitor: S. C. 342.

Notice by lunatic's committee.

The committee of the estate of a lunatic acting under s. 62 cannot give a valid notice, unless he has previously obtained authority from the Court of Lunacy to do so: *Re Ray's S. E.*, 25 Ch. D. 464.

Where trustees bound to take proceedings.

The trustees to whom notice is given are not bound to take proceedings, whatever their opinion may be as to the proposed dealing. In *Wheelwright* v. *Walker*, 23 Ch. D. 762, Pearson, J., seemed to think that if a tenant for life were attempting to commit a fraud, as by selling for a very low price, it would be the duty of the trustees to interfere, but s. 42 expressly exempts them from liability for not taking any proceeding which it is competent for them to take: and see as to the duty of trustees, *Hatten* v. *Russell*, 38 Ch. D. 334. In the case of a fraudulent sale or other disposition, the purchaser must almost necessarily be a party to the fraud, and the transaction could be set aside. It is conceived that any proceeding must be at the risk of the trustees: but see *Hatten* v. *Russell*, *sup.*, p. 344.

Time of notice.

It is sufficient for the purchaser if at the time of completion of the contract there are trustees, and notice has been given: *Hatten* v. *Russell*, *sup.* The notice is a matter with which the purchaser acting in good faith is not concerned: *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 623. Obviously the purchaser could not tell whether the tenant for life knows the trustees' solicitor. The private solicitor of a trustee is not necessarily his agent for accepting notices relating to the trust: *Saffron Walden Bldg. Socy.* v. *Rayner*, 14 Ch. D. 406.

It is best, however, for the vendor, unless notice has expired or been waived, to provide that the contract is not to become binding until the notice has expired or been waived, without any proceedings being taken whereby the sale is prevented. The Court would, it seems, restrain the granting of a lease until trustees are appointed, or the necessary notice given: *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 400; *Wheelwright* v. *Walker*, 23 Ch. D. 752.

Protection of purchaser.

The purchaser, though expressly protected by subs. 3 from seeing that notice is given, had better see that there are or have been in existence at least two trustees, or one trustee in cases where the settlement provides that one trustee may act alone: see *Hughes* v. *Fanagan*, 30 L. R. Ir. 111. Under the S. L. A., 1884, notice may be waived by the trustees, and they may accept less than the month's notice, therefore the purchaser need not see that the two trustees or the one trustee, as the case may be, have been appointed at least a month previous to completion. Where the transaction is a sale, the concurrence of the trustees in the conveyance to acknowledge receipt of the purchase-money would in itself be a waiver of notice. If the purchase-money is to be paid to the trustees the purchaser must see to the due appointment of those trustees, otherwise he does not obtain

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a valid receipt, unless the sale is made by the order of the Court: see C. A., s. 70.

Payment into Court under s. 22 (1) will not give a purchaser who has notice that there are no trustees a good title: *Re Fisher & Grazebrook*, 1898, 2 Ch. 660; unless the sale is made by a person appointed under s. 60 to act on behalf of an infant: *Re Dudley*, 35 Ch. D. 338.

Actual knowledge that no proper notice has been given—*e.g.* from the knowledge that there were no trustees—or that there was no waiver, would invalidate his title: *Hatten* v. *Russell*, 38 Ch. D. 334; *Hughes* v. *Fanagan*, 30 L. R., Ir. 111, on appeal. In such cases not even the legal estate would pass to the purchaser, and an agreement would be unenforceable: compare *Chandler* v. *Bradley*, 1897, 1 Ch. 315. An omission to give the necessary notice would be a breach of trust (s. 53, *inf.*, and n. thereto); a tenant for life would therefore be unable to enforce specific performance: *Thompson* v. *Blackstone*, 6 Beav. 470. The doctrine of constructive notice, however (C. A., 1882, s. 3, *sup.*), is not to be applied to invalidate titles of persons dealing in good faith with a tenant for life: *Mogridge* v. *Clapp*, *sup.*

And, on the question, generally, of notice to trustees, see that case, and *Hughes* v. *Fanagan*, *sup.*

Notice in case of leases.

All settlements should expressly dispense with notice, at least as to leases, where S. L. A., s. 7, does not already do so.

Order dispensing with notice.

An order has been made by the Court dispensing with notice under this s., but it seems very doubtful whether any such order can properly be made: *Honywood* v. *H.*, 1862, H. No. 121, 25th July, 1883.

Enfranchisement.

An enfranchisement is a sale within this s.: see note to s. 3 (ii.).

Surrender.

The case of a surrender, pure and simple, is omitted.

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XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

Applications are directed to be by summons in Chambers: see Rule 2, Chap. VIII., *inf*

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

See *Re Marquis of Ailesbury's S. E.*, 42 W. R. 45, and Rules 4, 5 and 6, Ch. VIII., *inf.*

(6). The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

Costs.

It would seem that in the ordinary course costs will be given as between solicitor and client: see Form III., Ch. VIII., *inf.*

Costs have been given where the application was unsuccessful: *Re Horne*, 39 Ch. D. 84, 90. And not only the costs of the application, but other costs of the parties of and incidental to the exercise of the powers of the Act (*e.g.* of an abortive sale), can be made a charge on settled land under this subs. and s. 47: *Re Smith's S. E.*, 1891, 3 Ch. 65; and see *Re Llewellin*, 37 Ch. D. 317, 326. Trustees taking different sides were allowed separate costs in *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506. As to the difference between costs and charges or expenses, see *Re Beddoe*, 1893, 1 Ch. 547, 554. Costs of successful applications were in *Re Bagot*, 1894, 1 Ch. 177, directed to be paid by the tenant for life, and in *Williams* v. *Jenkins*, W. N., 1894, 176, charged on the settled land subject to existing mortgages.

A direction in a settlement for payment of costs out of income was over-ridden in *Re Gee's Will*, 39 Sol. J. 539.

See also note on s. 21 (x.), *sup.* For form of order, see Seton, 6th ed., 1837.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

See S. L. A. Rules, Chap. VIII., *inf.*

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of

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the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

Durham Palatine Court.

The power of the Court may also, as regards land in the County Palatine of Durham, be exercised by the Court of Chancery of that County : see Palatine Court of Durham Act, 1889, s. 10.

Lancaster Court Rules.

And as to the present authority to make rules for the Lancaster Court, see Chancery of Lancaster Act, 1890, s. 6.

(9.) *General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.*

Repealed by the Statute Law Revision Act, 1898.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

County Court.

As to proceedings in the County Court under this Act, see County Court Rules, 1903, O. 38.

Payment of costs out of settled property.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land,

money or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Costs.

As to payment of the tenant for life's costs of a sale, including those of his own incumbrancers, see *Re Beck*, 24 Ch. D. 608. But the costs of the tenant for life's incumbrancers were disallowed in *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 339; 41 Ch. D. 375. As to costs incidental to the exercise of the powers of this Act, see s. 21 (x.), and note; also s. 46 (6).

For form of Order, see Seton, 6th ed., 1763, 1837.

Constitution of Land Commissioners; their powers, &c.

48.—(1.) *The Commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.*

52 & 53 Vict. c. 30.

The Land Commissioners are now the Board of Agriculture and Fisheries: see the Board of Agriculture Act, 1889, s. (1) (b.), and s. 13, which repeals this s. down to the end of subs. (5); also the Board of Agriculture and Fisheries Act, 1903.

Subss. 2–5 relate solely to the powers and duties of the Board generally, and are accordingly omitted here.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their

27 & 28 Vict. c. 114.

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proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of Commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

It is conceived that the expression "Act passed" only speaks and has effect after the Act in which it is contained has passed, and includes that Act.

Filing of certificates, &c., of Commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

See on this s., S. L. A., 1890, s. 4, which declares an instrument affecting the interest of the tenant for life by way of marriage settlement or family arrangement to be, not an assignment within this s., but part of "the settlement."

Disclaimer

This s. does not expressly provide against disclaimer of a power, but a tenant for life could not disclaim the powers and retain the estate; the disclaimer to be effectual must be complete, more especially as he is a trustee of the power, s. 53.

Effect of s.

The effect of this s. is that the person defined in the Act as tenant for life entitled to exercise the powers conferred by the Act, always remains so entitled: see *Re Mundy and Roper*, 1899, 1 Ch. 275; *Re Lord Wimborne and Browne*, 1904, 1 Ch. 537. He cannot divest himself of those powers, nor contract absolutely not to exercise them, but he may by assignment for value prevent himself from exercising the powers as against the assignee. It seems that though a tenant for life may have actually conveyed the estate, for his life interest therein, yet no release or reconveyance by his assignees is necessary. Their mere consent to the exercise of the power restores its full operation under s. 20, and it overrides all the limitations of the settlement: *Re Du Cane and Nettlefold*, 1898, 2 Ch. 96, 108–9; and see n. to s. 20, *sup.*, "What estates overreached." Thus the execution of powers under the Act is governed by the same principle as the execution of powers conferred by a settlement (as to which, see *Re Cooper*, 27 Ch.

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D. 565; *Noel* v. *Lord Henley*, M'Cl. & Y. 302; *Re Bedingfield & Herring*, 1893, 2 Ch. 332); except that the latter are capable of being released and extinguished, and are bound by a contract not to exercise them; there is this further exception, namely, that a lease under the Act without fine made by the tenant for life while he remains in possession will bind all his assignees.

Implied consent.

A mortgagee of the life estate who becomes a purchaser at a sale of the fee thereby consents to the sale: *Re Kingsley & Holder*, 115 L. T. News. 201.

Reversionary life estate.

The same principle applies to assignments made before as well as to those made after the commencement of the Act, and to assignments made by the tenant for life of his estate before it falls into possession.

Subs. 4, so far as regards leases, is stronger as against a mortgagee under a mortgage of a life estate than the power of leasing in s. 18 of the C. A., as against a mortgagee of the fee simple. The latter power does not affect a mortgagee prior to the Act or a mortgagee who contracts himself out of the Act. Under subss. 3 and 4 of this s. any lease at the best rent and without fine made in conformity with this Act by a tenant for life while in possession binds his mortgagee, whether the mortgage be made before or after this Act and notwithstanding any agreement to the contrary. This seems unobjectionable, as the mortgagee of a tenant for life has no permanent interest in the land, and the exercise of the power must generally be for his benefit by producing income; see *Re Mansel's S. E.*, W. N., 1884, 209.

Cesser of powers of tenant for life.

Notwithstanding this s. the tenant for life will cease to have the powers conferred by the Act when there is a complete disentail operating as a complete disposition of the fee simple by tenant for life and remainderman, with no relimitation of a life estate to the former tenant for life; the remainderman never had the powers. If there be a re-settlement, that of course brings the Act again into operation.

Effect of re-settlement.

As to the effect generally of a re-settlement, and as to restoring on a re-settlement the life estate of the tenant for life under the prior settlement, see n. to s. 2 (1), *sup.*, "Compound Settlement."

Tenant in tail.

The powers of the Act are given to a tenant in tail in possession, s. 58; and it would seem to follow from *Re Mundy & Roper*, *sup.*, that he can exercise the powers after having, while in possession, barred the entail, if, by reason of family charges a settlement is still subsisting: see *Re Lord Wimborne & Browne*, 1904, 1 Ch. 537, and nn. to s. 2 (1), *sup.*, "Compound Settlement;" "By way of succession."

Surrender by tenant for life to remainderman in fee.

On a surrender by the tenant for life to the immediate remainderman in fee the Act ceases to be applicable, unless family charges are still subsisting so that the land still stands limited to persons by way of succession, in which case the powers of the tenant for life remain exercisable, notwithstanding that his life estate is extinguished by the surrender: *Re Lord Wimborne & Browne*, *sup.* And where the tenant for life surrenders his life interest in an undivided share of the settled lands to the remainderman, he can still exercise his powers as to the entirety, with the consent of the remainderman if an assignee

for value: *Re Barlow*, 1903, 1 Ch. 382. Many titles must have been made by a tenant for life, who was in possession by reason of a surrender of a prior tenant for life, while the latter was alive. These appear to be invalidated.

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liabilty to determination or cesser by or on his exercising the same.

The previous s. precludes the tenant for life from divesting himself of the powers conferred by the Act. This s. precludes the settlor from taking away or cutting down those powers, and from giving them to trustees instead of to the tenant for life: *Re Clitheroe Estate*, 31 Ch. D. 138; and overrides a private Act: *Re Chaytor's S. E. Act*, 25 Ch. D. 651; and see *Re Hale & Clark*, 34 W. R. 624; W. N., 1886, 65. But there must be, to begin with, a limitation which, but for the attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act: see *Re Atkinson*, 31 Ch. D. 577, 581; *Re Hazle's S. E.*, 29 Ch. D. 78, 84; *Re Edwards*, 1897, 2 Ch. 412. Subs. 1 makes any clause of forfeiture void, and by subs. 2 an estate originally limited so as to cease when the tenant for life attempts to make use

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of the powers of the Act, is enlarged into the estate which would have existed irrespective of the clause of cesser.

The restraint on anticipation by a married woman is removed (s. 61 (6)) so as to enable the powers of the Act to be exercised by her notwithstanding that restraint.

The provisions made void by this s. are only provisions which prevent or tend to prevent the exercise of the powers of the Act. Consequently a limitation over on bankruptcy of a tenant for life or on alienation of his life estate is not affected: *Re Levy's Trusts*, 30 Ch. D. 119. After a sale of the fee simple under the Act he would still be entitled to the income of the proceeds of sale until bankruptcy or alienation. There is, therefore, in such a case no provision tending to prevent the exercise of the statutory powers. Also an obligation to create a sinking fund, to pay off moneys raised for improvements under the settlement, is valid, since it does not interfere with the powers conferred by the Act: *Re Sudbury & Poynton Estates*, 1893, 3 Ch. 74. On the other hand, a limitation over or the cesser of an annuity in case of non-residence is rendered void, so far as it tends to prevent the exercise of the statutory powers: *Re Paget*, 30 Ch. D. 161; *Re Eastman*, W. N., 1898, 170; 68 L. J., Ch. 122; *Re Dalrymple*, 49 W. R., 627; *Re Fitzgerald*, 1902, 1 Ir. R. 162; *Re Richardson*, 1904, 2 Ch. 777 (cited in n. to s. 58 (1) (ii.), *inf.*)

But this s. does not prevent the forfeiture taking effect, if the tenant for life ceases to reside for any reason other than the exercise of his statutory powers: *Re Haynes*, 37 Ch. D. 306; *Re Trenchard*, 1902, 1 Ch. 378.

The prohibition in this s. applies not only to a provision in the settlement itself, but also to a provision in any other instrument. Thus a bequest of income, for keeping up a settled estate, and of the balance to the tenant for life, with a provision, that if he should cease to be entitled to the rents and profits, the income-bearing fund should fall into residue, takes effect under subs. 2 as a bequest of income for life, and does not cease on sale of the estate: *Re Ames*, 1893, 3 Ch. 479; and a gift over of personal estate to take effect on a sale of the land is void: *Re Smith*, 1899, 1 Ch. 331.

Attempts to evade the Act.

The Act cannot be evaded by a limitation by way of trust or otherwise to A. for his life of an annuity payable out of rents and profits, greater in amount than the income of the property, and, subject thereto, a limitation of the property during A.'s life to the use of or in trust for B. In such a case B. would be tenant for life within the Act under s. 58 (1) (ix.), or s. 58 (1) (v.) and s. 2 (7): see *Re Jones*, 26 Ch. D. 736; *Re Clitheroe*, 28 *ib.* 378; 31 *ib.* 135.

Provision against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

See *Re Haynes*, cited in note to last s.

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Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

See also S. L. A., 1890, s. 12.

This s. does not make the tenant for life a trustee within the Lunacy Act, 1890, s. 128: *Re Baggs*, 1894, 2 Ch. 416 n.; and see *Re Salt*, 1896, 1 Ch. 117, 121.

As a general rule the tenant for life is entitled to make the full profit out of all the legal incidents of his life estate. He may, when not impeachable for waste, cut all the profitable timber, though equity will restrain him from cutting where it is without adequate advantage and, apparently, simply malicious. On the same principle, before the Act 8 & 9 Vict. c. 106, s. 8, a tenant for life, with remainder to issue unborn, with remainder to himself in fee, could by simple conveyance destroy the contingent remainder, and no relief could be obtained in equity. But by this s. he is made a trustee as to all powers conferred on him by the Act, and is accountable as such. Thus the tenant for life may make an improper or improvident sale or lease, good in favour of the purchaser or lessee under s. 54, but under this s. he will be answerable to the same extent as a trustee making the same sale or lease; this s. does not impose a condition affecting title: *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 536, 545. The general effect of this s. is to make the tenant for life answerable for an improvident or improper exercise of the powers conferred on him by the Act in the same manner as if he were an actual trustee; and he ought to take into consideration the sentimental objections of remaindermen, and the interests of the people upon his estate: see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531, 539; *Re Duke of Marlborough*, *ib.* 127, 134; 32 *ib.* 8, 11; *Re Lord Stamford's S. E.*, 43 *ib.* 84, 95; *Re Earl of Radnor*, 45 *ib.* 402, 416, 423; *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 540; 1892, A. C. 356; *Sutherland* v. *S.*, 1893, 3 Ch. 169. But the fact that he will derive a benefit is not in itself sufficient to prevent him from exercising his discretion: *Re Lord Stamford*, 56 L. T. 484; *Re Richardson*, 1900, 2 Ch. 778; nor the fact that the devolution of the property may be altered: *Re Duke of Marlborough*, 32 Ch. D. 1, 11. Nor will he be restrained from selling merely on speculative evidence adduced by the remainderman of the prospective value of the estate: *Thomas* v. *Williams*, 24 Ch. D. 558. *Secus*, if he attempts to sell the property infinitely below its value: *Wheelwright* v. *Walker*, 23 *ib.* 752, 762, *per* Pearson, J. See also note to s. 3 (i.). And the Court will restrain a tenant for life from mortgaging, when the mortgage would unjustly prejudice the interests of other persons claiming under the settlement: *Hampden* v. *Earl of Buckinghamshire*,

When sale not restrained.

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1893, 2 Ch. 531; or from leasing on terms—*e.g.* restrictive of the sale of intoxicating liquors—prejudicial to such persons: *Re Earl Somers*, 39 Sol. J. 705. For cases in which leases were held invalid under this s., see *Sutherland* v. *S.*, *sup.*; *Chandler* v. *Bradley*, 1897, 1 Ch. 315, 320; *Middlemass* v. *Stevens*, 1901, 1 Ch. 574.

Application of proceeds of sale of heirlooms.

As to the bearing of this s. on the question whether the proceeds of the sale of heirlooms ought to be applied in discharging incumbrances on the settled lands, see *Re Duke of Marlborough*, 32 Ch. D. 1; *Re Lord Stafford's Settlement & Will*, 1904, 2 Ch. 72; and n. to s. 37, *sup.*

Restrictive covenant.

A tenant for life who, when selling, takes a restrictive covenant from the purchaser cannot validly agree that on payment of a certain sum at any future time the covenant shall be released: *Palmer* v. *Grand Junction &c. Co.*, 86 L. T. 352.

Damages recovered from lessee.

Damages recovered by a tenant for life from a lessee in an action on a repairing covenant in a lease granted by such tenant for life are by virtue of this s. recovered by him as trustee for the trust estate, and the trustees of the settlement are entitled to be joined as plaintiffs: *Mitchell* v. *Armstrong*, 17 T. L. R. 495.

A person claiming under the tenant for life cannot complain of a breach of trust committed by him: *Re Freme*, 1894, 1 Ch. 1, 10.

Costs.

The tenant for life is not entitled to trustees' costs: but see *Re Llewellin*, 37 Ch. D. 317, 325–8; *Re Smith's S. E.*, 1891, 3 Ch. 65. Only one set of costs was allowed to him and his mortgagees in *Sebright* v. *Thornton*, W. N., 1885, 176: and see *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 339; 41 *ib.* 375.

General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

This s. makes good the title of a purchaser, &c., dealing with a tenant for life, provided he is not a party to and has no notice of any improper dealing: *Re Handman & Wilcox*, 1902, 1 Ch. 599; *Hurrell* v. *Littlejohn*, 1904, 1 Ch. 689; and see as to bribe, *Chandler v. Bradley*, 1897, 1 Ch. 315. In regard to notice the C. A., 1882, s. 3, aids the purchaser's title.

Sub-purchaser.

Whether a purchaser for value without notice from a purchaser, &c., not entitled to the benefit of this s. gets a good title, *qu.*, see *Re Handman & Wilcox*, *sup.* It depends on whether the sale, &c., to the original purchaser, &c., was void or only voidable, and it is conceived

that it would be wholly void. But even if it was voidable only, the Court will not force the title upon an unwilling purchaser from him: S. C.

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Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

See n. to s. 48 (1.), *sup.*, as to the substitution of the Board of Agriculture and Fisheries for the Land Commissioners.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

See the special powers for completion of sales, &c., conferred by s. 20, and S. L. A., 1890, s. 6.

As to covenants for title by a tenant for life, see *Re Ray*, 1896, 1 Ch. 468, 474, 479.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

See *Re Llewellin*, 37 Ch. D. 317, 326–8; *Re Smith's S. E.*, 1891, 3 Ch. 65.

Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any

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matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

"Powers . . . subsisting . . . by statute," *e.g.* under the Lands Clauses Acts; see *Re Bentinck and L. and N. W. Ry. Co.*, 40 Sol. J. 130.

Mode of exercise of settlement powers.

By this s. all the powers of the settlement are preserved, but it would be very inconvenient where trustees have powers for sale or for other purposes at their discretion, that there should be also concurrent powers vested in the tenant for life under the Act. It is therefore provided that in all cases powers in trustees similar to those conferred by the Act are to be exercised only with the consent of the tenant for life; see *Re Clitheroe*, 28 Ch. D. 378; 31 *ib.* 135; *Re Atherton*, W. N., 1891, 85. A person dealing with the tenant for life thus knows that no other antagonistic dealing can take place. The effect of this and the next s. is, that the settlor may enlarge but cannot restrict the powers of a tenant for life under the Act.

Conflict and cumulation.

In *Re Duke of Newcastle*, 24 Ch. D. 129, 138, Pearson, J., considered that the first part of subs. 2, "But, in case of conflict," &c., merely meant that if there were a power given to the tenant for life by the settlement for the same purpose, but not so large as a power in the Act, the tenant for life might exercise the power in the Act. But this is a case of cumulation, not of conflict, and is provided for by subs. 1. Two powers in one person cannot, as a rule, create any conflict. But a power under the settlement to trustees and a power for the same purpose under the Act to a tenant for life create a conflict: *Clarke* v. *Thornton*, 35 Ch. D. 307, 315; *Re Osborne & Bright's, Ltd.*, 1902, 1 Ch. 335. Therefore subs. 2 provides that an exercise by the tenant for life of the powers of the Act is to prevail, and that the trustees are not to exercise their powers under the settlement without his consent. In this view the latter part of subs. 2 does not seem, as the learned judge thought, to go away altogether from the case in the first part of the subs. Where two powers are vested in the same person, there would be a conflict if, *e.g.*, the power in the settlement were only exerciseable with some consent not required by the Acts; see *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687, 697. Where two or more persons together constitute the tenant for life, the consent of one only to the exercise by the trustees of their powers under the settlement is necessary: S. L. A., 1884, s. 6 (2). As to when two or more persons together constitute the tenant for life, see s. 2 (6), *sup.* and n. thereto, and *Re Osborne & Bright's, Ltd.*, *sup.*

Consent.

It is conceived, however, that to the exercise of a power given to trustees for raising charges by mortgage or sale, the consent of the tenant for life would not be necessary. The trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. Therefore a contract by the trustees to sell in such a case would prevail over a similar contract by the tenant for life, and no difficulty would arise: compare *Re Carne's S. E.*, 1899, 1 Ch. 324. The case would be similar to that of contracts by two successive mortgagees, each with a power of sale. This construction is supported by the words "power exerciseable for any purpose provided for in this Act," which must mean purposes connected with the settled land and the settlement, not purposes paramount to the rights of the persons claiming under the limitations of the settlement.

When trustees can mortgage or sell.

When the tenant for life contracts to sell, he can give a title to a purchaser free from charges created by the settlement under which no money has been raised: s. 20 (2) (ii.); and they would be transferred to the proceeds of sale. In such case there would be no conflict between the provisions of the settlement and the provisions of this Act, and the trustees would not be necessary parties to the conveyance except for the other purposes of the Act.

When tenant for life can sell alone.

Trustees contracting to sell, without any power to do so, cannot compel the purchaser to take a new contract from the tenant for life, as vendor under this Act: *Re Bryant and Barningham*, 44 Ch. D. 218.

In the case of *Re Duke of Newcastle*, 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779, it was held—

(1.) That rents received by the trustees during minority were to be dealt with as directed by the settlement without regard to the Act.

Rents during minority.

(2.) That a power to trustees by the direction of the tenant for life or in tail in possession, if of age, and, if not, of his guardians, to sell or exchange was exerciseable by the trustees during minority of the infant tenant in tail by the direction of the guardians.

Settlement powers how exerciseable.

(3.) That a power to the guardians during minority to grant agricultural, building, and mining leases was exerciseable by them with the consent of the trustees, as taking, under s. 60, the power to consent given to the tenant for life under s. 56 (2).

(4.) That mining rents were to be applied as directed by the settlement, there being a "contrary intention" expressed within the meaning of s. 11.

Mining rents.

And (5.) That though there was no power for the purpose in the settlement, the trustees could, under s. 60, sell surface apart from minerals under s. 17, and the consent of the guardians would not be necessary.

Power under Act cumulative.

In the case of *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687, it was held—

(1.) That a mining lease granted "in exercise of every power enabling him" by a tenant for life, who had power to grant mining leases under the settlement, was granted under the power in the settlement, which was first in point of date, and not under the power in the Acts.

Exercise of "all powers."

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What "provisions" referred to.

(2.) That the "conflict" referred to in s. 56 (2) means a conflict between provisions connected with the execution of the power, not with the results of such execution; hence that, assuming the lease could have been granted under the S. L. A., there was no conflict within the meaning of s. 56, by reason that under the settlement the tenant for life was entitled to the whole of the mining rents, and by s. 11 part is to be capitalized.

Improvements.

The cost of improvements within the meaning of the Acts is payable out of capital money, notwithstanding that by the settlement they are made payable out of income: *Clarke* v. *Thornton, sup.*; *Re Thomas*, 1900, 1 Ch. 319.

Stay of proceedings under S. E. A.

Proceedings under an order for sale made under the S. E. A., may be stayed so as to enable a sale under this Act: *Re Barrs-Haden*, 32 W. R. 194; W. N., 1883, 188; or a lease: *Re Poole*, 32 W. R. 956.

Private Act overreached by this Act.

And the powers under this Act overreach the provisions of a private estate Act passed previously to the commencement of this Act (*Re Chaytor*, 25 Ch. D. 651), but not an actual order, by the Court, for sale: *Taylor* v. *Poncia*, *ib.* 646; and note to s. 3 (i.), *sup.*

As to conferring powers under the S. E. A., when powers under this Act can be exercised, see *Re Mansel's S. E.*, W. N., 1884, 209; *Re Houghton's S. E.*, W. N., 1894, 20.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

For form of summons for opinion, advice, and direction under this subs. see Form XXI., Chap. VIII., *inf.*

In a petition under s. 56, Bacon, V.-C., required an allegation of the "statutory conflict": *Re Clitheroe Estate*, 28 Ch. D. 388.

Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

See *Re Earl of Egmont's S. E.*, 44 Sol. J. 428.

This subs. prevents any question as to how the combined powers of the settlement and the Act operate. An additional power to sell or

lease could, under the settlement taken alone, only operate by revocation and appointment of uses. Under this subs. the additional powers will be common law powers taking effect in the same manner as the powers of the Act: see note to s. 20.

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XIII.—LIMITED OWNERS GENERALLY.

LIMITED OWNERS GENERALLY.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

Enumeration of other limited owners, to have powers of tenant for life.

"Possession" in this s. means possession properly so called as distinguished from remainder or reversion, and there is no distinction as regards a person in possession personally or by his guardian if an infant: *Re Morgan*, 24 Ch. D. 114, 116; *Re Jones*, 26 *ib.* 736, 744; *Re Strangways*, 34 *ib.* 423; *Re Martyn*, 69 L. J. Ch. 733; and see s. 2 (5); *Re Edwards' Settlement*, 1897, 2 Ch. 412.

"Possession" includes receipt of rents and profits (s. 2 (10) (i.)), so that a lease does not prevent the estate or interest being in possession.

"Possession."

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

See n. to s. 2 (1), "Compound Settlement."

This subs. extends the benefits of the Act to tenants in tail under Acts of Parliament ("settlement" includes "Act of Parliament," s. 2 (1)), which restrain a bar of the entail. It also enables a sale where a bar of the estate tail is prevented by the Act 34 & 35 Hen. 8, c. 20 (as to which see Fines and Recoveries Act, 1833, s. 18). It also, in connexion with subs. (iii.), enables the Crown reversion in Ireland under a grant from the Crown to be barred, though the tenant in tail cannot bar it by enrolled deed—see Fines and Recoveries (Ireland) Act, 1834—as he can in England under the English Act (s. 15) where the case is not within the Act of Hen. 8. But then, under s. 22 (5) of this Act, the money (subject to any application under s. 21), or the investments representing it, and, under s. 24, the land acquired with it, will become inalienable, or subject to a reversion in the Crown, as

As to certain unbarrable entails.

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the case may be (see note to subs. iii.). The Act does not apply to lands purchased with money provided by Parliament for public services. Thus the parliamentary estates settled on the Dukedom of Wellington and the Earldom of Nelson cannot be sold under this Act. But the lands settled on the Earldoms of Shrewsbury and Abergavenny, and all lands which have hitherto become inalienably entailed under the Act 34 & 35 Hen. 8, c. 20, can now be sold; also the lands and mansion settled on the Dukedom of Marlborough, inalienably entailed under 5 Anne, c. 3, being respectively lands provided by the Crown with the sanction of Parliament, and a mansion, principally built at the expense of the Crown out of moneys granted by Parliament; *Re Duke of Marlborough's Parliamentary Estates*, 8 T. L. R. 179; *Re Duke of Marlborough's Blenheim Estates*, *ib.* 582.

Finance Act, 1894.

A tenant in tail of lands settled by Act of Parliament with a restriction upon alienation, is not by virtue of this s. a person capable of alienating the lands within the meaning of s. 5, subs. 5, of the Finance Act, 1894: *Re Bolton Estates Act*, 1863, 1904, 2 Ch. 289.

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

Leaseholds.

This subs. does not seem to apply to the owner of leaseholds subject to a gift over. Even if leaseholds are settled on trusts corresponding with the uses of the freeholds, the tenant in fee of the latter with a gift over cannot dispose of the settled leaseholds, *sed qu.*

This subs. must be read with C. A., 1882, s. 10, *sup.*; and see n. to s. 2 (1), *sup.* "Alternative gifts."

Instances of executory devise.

Where there was a devise upon trust to pay the rents to the testator's wife for the maintenance of his son until twenty-one, and then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon trust for the wife for life, and after her death upon other trusts, it was held that under this subs. the infant son was in the position of a tenant for life, being tenant in fee simple with an executory limitation over, and the trustees of the will were appointed trustees for the purposes of the Act: *Re Morgan*, 24 Ch. D. 114; and where the fee, legal or equitable, is devised to such children of A. as attain twenty-one, the first child or the several children attaining that age (in whom the fee vests, subject, if and when others attain twenty-one, to be divested as regards the shares of the others: see Fearne, Contingent Remainders, 313–15), and in the meantime the heir-at-law, to whom the fee descends until the contingency happens, are, under this subs., tenants for life, within the meaning of the Act, of the shares which have not vested indefeasibly: *Re James*, W. N., 1884, 172; 32 W. R. 898; *Egerton* v. *Massey*, 3 Com. B., N. S., 338; *Wade-Gery* v. *Handley*, 1 Ch. D. 653; 3 *ib.* 374; see also *Pells* v. *Brown*, Cro. Jac. 590.

Where there was a devise to C. upon condition that she resided at a specified house and provided there a home for E., with a gift over on non-compliance with the condition, it was held that C. had the powers

of a tenant for life under this subs., that the condition was void under s. 51 so far as it prevented the exercise of such powers, hence that on a sale C. was entitled to the proceeds absolutely: *Re Richardson*, 1904, 2 Ch. 777.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

Base fee.

This subs. seems to refer to the case of a person entitled to the whole base fee. But the base fee may itself be settled. In the last-mentioned case, if there are trustees of the settlement of the base fee only, then the base fee only can be conveyed on a sale by the tenant for life, and the reversion is untouched. In either case it seems that the fee simple cannot be conveyed under this Act unless there are trustees of the compound settlement constituted by all the instruments under which the fee simple stands limited, *e.g.*, the grant from the Crown on the settlement, and the deed creating the base fee, and if the base fee has itself been settled the settlement thereof. Possibly *Re Morshead's S. E.*, W. N., 1893, 180, is an authority that it is sufficient if there are S. L. A. trustees of the instrument creating the estate tail; at any rate, if the person entitled to, or tenant for life of, the base fee is the person who, if it had not been created, and no other disentailing assurance had been executed, would have been tenant in tail under the instrument creating the estate tail; the difficulty is that, if a tenant in tail in remainder bars without the consent of the protector, and then becomes entitled in possession to the base fee so created, he is not entitled thereto under the settlement alone, but under the disentailing assurance as well.

Compound settlement trustees, *qu.* necessary.

Crown reversion in Ireland.

This subs. has an important effect in Ireland, where there are large tracts in which the Crown has a reversion on a base fee. The tenant for life is now able to sell free from his reversion, provided trustees are appointed of the whole settlement, including the grant from the Crown, in which case however the trustees may feel difficulty in parting with the purchase-money without consent of the Crown except for re-investment in land. The only other mode of barring the Crown's reversion is by a sale through the Landed Estates Court (21 & 22 Vict. c. 72, s. 61). It is conceived that there are many cases in England where the fact that a perpetual entail exists under the Act 34 & 35 Hen. 8, c. 20, has been altogether lost sight of. If the Crown grant be before that Act, a recovery before the Act barred the issue but not the Crown's reversion (*Neal* v. *Wilding*, 1 Wilson, 275), and after the Fines and Recoveries Act the reversion also could be barred, and thus a complete title obtained. In many cases it may be difficult to ascertain whether the entail is subsisting or not.

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

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A person entitled to receive rent of freehold land during the subsistence of a lease for years thereof, if he should so long live, and also to receive an annuity for life, equal to the rent, after the determination of the lease, is not tenant for life within the meaning of this subs.: *Re Hazle*, 26 Ch. D. 428, affirmed 29 *ib.* 78; see also subs. (vi.).

A tenancy for ninety-nine years, if the tenant should so long live, was often limited, in old settlements, instead of a tenancy for life, with the view of making the suffering of a recovery more difficult: see Martin's Conveyancing, vol. i., p. 428; Peachey on Settlements, p. 13, note (*g*); Burton's Compendium, pl. 1449; *Bell* v. *Holtby*, 15 Eq. 189; *Re Mundy and Roper*, 1899, 1 Ch. 275, 298; and compare *Woolmore* v. *Burrows*, 1 Sim. 512, 527.

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

See *Re Atherton*, W. N., 1891, 85: *Vine* v. *Raleigh*, 1896, 1 Ch. 37, cited on s. (5), *sup.*; from which latter case it would seem (see p. 41) that the tenant for life need not be *beneficially* entitled, as under s. 2 (5) he must be, *sed. qu.*

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

A limitation to a widow during widowhood, or to one so long as he resides, gives, in law, an estate for life determinable, see Co. Lit. 42a.; Burt. Comp. pl. 725; Williams, R. P., 19th ed., 127.

Limitation over on non-residence.

A devise to A. so long as he resides a specified time, and then over, makes him tenant for life within this subs.: *Re Paget*, 30 Ch. D. 161; *Re Eastman*, W. N., 1898, 170; 68 L. J. Ch. 122; *Re St. Donat's S. E.*, 79 L. T. 542; compare *Re Edwards' Settlement*, 1897, 2 Ch. 412. A tenant for life subject to a term is within this subs., although during the subsistence of the term he could not take possession; *Re Clitheroe*, 28 Ch. D. 378; 31 *ib.* 135; see also *Re De Hoghton*, 1896, 1 Ch. 855; *Re Richardson*, 1900, 2 Ch. 778; *Re Money Kyrle's Settlement*, *ib.*, 839. Also a tenant for life, whose enjoyment is suspended during an express or implied trust for accumulation, *Williams* v. *Jenkins*, 1893, 1 Ch. 700; *Re Martyn*, 69 L. J. Ch. 733. Also residuary legatees entitled to stop the accumulation of rents of real estate directed to be made during the life or widowhood of A., and to be added to residue: *Re Drinkwater's S. E.*, 49 Sol. J. 237. A right

Trust to accumulate.

to occupy rent free is within this s.: *Re Carne's S. E.*, 1899, 1 Ch. 324. A discretionary trust in trustees during the life of A. to pay the rents for the benefit of A. and his wife and children (there being no children in existence), does not make A. and his wife a tenant for life under this subs.: *Re Atkinson*, 30 Ch. D. 605, affirmed 31 *ib.* 577; and see *Re Horne*, 39 *ib.* 84; and a trust to accumulate for twenty years and then to convey to uses under which an existing person, if then living, would be tenant for life does not make him a present tenant for life within the Act: *Re Strangways*, 34 Ch. D. 423, distinguished in *Re Martyn*, *sup.*

Discretionary trust.

And see *Re Theaker's S. E.*, cited on s. 2 (5), *sup.*

(vii.) A tenant in tail after possibility of issue extinct:
(viii.) A tenant by the curtesy:

The possibility of an estate by the curtesy does not make a fee simple interest to which a married woman is entitled for her separate use without power of anticipation, "settled land": *Bates* v. *Kesterton*, 1896, 1 Ch. 159; and see *Re Pocock and Prankerd*, *ib.* 302.

Under S. L. A., 1884, s. 8, an estate by the curtesy is to be considered as arising under a settlement made by the wife.

Tenant by the curtesy.

And see *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

Subject to a term for raising money there was a devise to the use of trustees during the life of A. upon trust to enter into possession, and manage and pay expenses and outgoings and an annuity, and pay the balance of the rents to A. during his life. There was no balance. It was held that A. had under this subs. the powers of a tenant for life: *Re Jones*, 24 Ch. D. 583, affirmed 26 *ib.* 736; see also *Re Clitheroe*, 28 *ib.* 378, affirmed 31 *ib.* 135; *Re Cookes*, W. N., 1885, 177.

"Entitled to the income of land" means entitled under the limitations of the settlement without regard to incumbrances: *per* Cotton, L. J., *Re Jones*, 26 Ch. D. 738. It includes the case of several persons entitled absolutely: *Re Bennet*, 1903, 2 Ch. 136; but not of several persons who are the objects of a discretionary power: *Re Atkinson*, 31 Ch. D. 577; *Re Horne*, 39 *ib.* 84, 89. A trust to repair does not prevent the equitable tenant for life from being let into possession upon an undertaking to repair: *Re Bentley*, 54 L. J. Ch. 782; 33 W. R. 610; and see *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297; and see *Re Richardson; Re*

Effect of trust for repairs.

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Money Kyrle, cited under subs. (vi.), *sup.* As to "expenses of management," see *Clarke* v. *Thornton*, 35 Ch. D. 311; *Re Thomas*, 1900, 1 Ch. 319.

A limitation of real estate on trust for a married woman for life for her separate use without power of anticipation, with remainder to such uses as she should by will appoint, and in default, to her in fee simple, brings her within this subs. though there is no "settlement" within s. 2: see *Re Pocock and Prankerd*, 1896, 1 Ch. 302.

"Until sale of the land."

Where there is an immediate *trust* for sale, and payment of rents until sale, it is conceived that the case comes within s. 63, and is taken out of this part of the Act, and must be dealt with under that s. together with S. L. A., 1884, ss. 6 (1) and 7.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

See on this subs., *Re Pocock and Prankerd, sup.*, at p. 306.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

The general effect of this s. is, that in all the preceding provisions of the Act each limited owner here mentioned is to be considered as also inserted wherever tenant for life is mentioned, and all consequential provisions as to trustees, the Court, and other matters apply to the case of each such limited owner "as if each of them were a tenant for life" (subs. 1), as well as to the case of a tenant for life.

See also the Glebe Lands Act, 1888, s. 8 (4); Universities and College Estates Act, 1898.

INFANTS; MARRIED WOMEN; LUNATICS.

XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

Infant absolutely entitled to be as tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

"Entitled in possession": compare *Leslie* v. *Earl of Rothes*, 1894, 2 Ch. 499, 517.

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INFANTS; MARRIED WOMEN; LUNATICS.

"Land" means land of any tenure (see n. to s. 2 (3)), so that this s. includes copyholds and leaseholds as well as freeholds: see *Re Simpson*, 1897, 1 Ch. 256.

This s. does not apply where an infant is contingently entitled: *Re Horne*, 39 Ch. D. 84; but compare *Re Sparrow's S. E.*, 1892, 1 Ch. 412, a decision on C. A. s. 41. Where an infant was entitled as heir-at-law to an undivided share, the Court appointed a person to exercise the powers of the Act on his behalf on a sale of the entirety, but refused to appoint for that purpose a co-owner: *Greenville's Estate*, 11 L. R. Ir. 138; the sale may be made out of Court: *Re Price*, 27 Ch. D. 552.

Infant contingently entitled.

Appointment of person to exercise powers of infant.

A share to which an infant becomes entitled in possession, on an intestacy, of partnership land, is within the meaning of this s.: *Re Wells*, 31 W. R. 764; W. N., 1883, 111. It seems that "the settlement" should be described, in summonses and orders under this s., as a "settlement deemed to be existing under the S. L. A., 1882": see the order in *Re Wells*, Seton, 5th ed., 1512; see, however, in the case of a will *Re Simpson*, *sup.*

Partnership land.

See also s. 2 (4), notes.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Tenant for life, infant.

Under 49 & 50 Vict. c. 27, the mother may appoint a guardian. A widow is now always guardian of her infant children either alone or jointly with the guardians appointed by the father.

Guardian.

The effect of this s. is not to take away the powers of an infant being tenant for life, or having the powers of a tenant for life under s. 59, but to enable the appointment of persons to exercise them on his behalf. This is important in construing ss. 61, 62.

During the infancy of a person in the position of a tenant for life, any consent by him required under this Act must be given by the trustees: *Re Duke of Newcastle*, 24 Ch. D. 129; and they may as trustees approve under s. 26 schemes for improvements of their own making: *Re Grey's Court Estate*, W. N., 1901, 60.

Consent of infant.

A sale may be made by persons appointed under this s., though there are no trustees of the settlement within the meaning of this Act, but the purchase-money must be paid into Court: *Re Dudley*, 35 Ch. D. 338.

Sale though no trustees.

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INFANTS; MARRIED WOMEN; LUNATICS.

The term, "trustees of the settlement" in this s., extends to trustees appointed by the Court under s. 38, *sup.*: S. C.

Appointment of trustees for purposes of s. 60.

The usual practice now is to apply alternatively for the appointment of trustees, or of persons to exercise the powers of the S. L. A.'s; and the order is often confined to authorizing their exercise in reference to some particular case; but trustees will be appointed where more convenient: *Re Wells; Re Simpson, sup.* The order may direct a sale to be made out of Court: *Re Price*, 27 Ch. D. 552. For forms of orders, see Seton, 6th ed., 1816–18, 1825, 1828.

An infant who takes a vested estate, liable to be divested on his death under the age of twenty-one, is within this s.: *Re James*, W. N., 1884, 172; 32 W. R. 898: *Re Morgan*, 24 Ch. D. 114.

C. A., s. 42.

The trustees of the settlement are not by virtue of this s. made trustees with power of sale under C. A., s. 42: *Re Helyar*, 1902, 1 Ch. 391.

For form of summons for the appointment of persons to exercise powers on behalf of an infant, see Form XXII., Chap. VIII., *inf.*

In the case of *Re Wells* (31 W. R. 764; W. N., 1883, 111), an appointment of trustees was made on the application of a next friend: and see *Greenville's Estate*, cited in note to last s.

See upon this s. *Re Powell*, cited in note to s. 63 (1), *inf.*; and *Re M'Clintock*, 27 L. R. Ir. 462.

Married woman, how to be affected.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

Judicial separation or protection order.

A decree for judicial separation under 20 & 21 Vict. c. 85, ss. 7, 25, or a protection order under s. 21 of that Act and 21 & 22 Vict. c. 108, ss. 6, 8, or under 41 & 42 Vict. c. 19, s. 4, constitutes the married woman a *feme sole*, and she, as a tenant for life, thereby becomes entitled to sell without the concurrence of her husband. A judicial separation only makes her a *feme sole* as from the date of the decree or order (20 & 21 Vict. c. 85, s. 25), and the estate for life must have been acquired whether in possession or reversion after that date: *Waite* v. *Morland*, 38 Ch. D. 135. But under 21 & 22 Vict. c. 108, s. 8, a protection order makes her a *feme sole* as to an estate for life which falls into possession after the date of the order though she was previously entitled in remainder: *Re Whittingham*, 12 W. R. 775; *Re Insole*, L. R. 1 Eq. 470; see also Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a).

Every estate for life acquired by a married woman after 1882 is now acquired by her as a *feme sole* under the M. W. P. A.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

An order under s. 91 of the Fines and Recoveries Act affords no assistance towards dispensing with the husband's concurrence. It does not affect the husband's rights and does not enable a conveyance under a joint power: *Re Eden*, 28 L. J. C. P. 5.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

A married woman absolutely entitled, except for a restraint on anticipation, is not within this s.: *Bates* v. *Kesterton*, 1896, 1 Ch. 159; and see *Re Pocock and Prankerd*, *ib.* 302.

Infant married woman.

This s. does not enable a married woman who is an infant to exercise the powers of the Act; the disability of infancy remains, notwithstanding coverture, and ss. 59 and 60 apply (*Hearle* v. *Greenbank*, 3 Atk. 695; Sug. Powers, 8th ed., 177), unless the intention is clear that the power should be exercised during minority: *Re Cardross*, 7 Ch. D. 728; *Re D'Angibau*, 15 *ib.* 228. The effect of subs. 4 is to make all the previous ss. of the Act read as if the expression "tenant for life" had been, in the case of a married woman entitled for her separate use, or as a *feme sole*, replaced by "married woman tenant for life," and had been in any other case replaced by "married woman tenant for life together with her husband."

Acknowledgment unnecessary.

Subs. 5 expressly authorizes the married woman to execute the powers of the Act by deeds and instruments which (as in the case of other powers to be exercised by deed) will not require acknowledgment: Sug. Powers, 8th ed., 153. In fact, acknowledgment is, by the Fines and Recoveries Act, confined to dispositions authorized by that Act, and cannot apply to any other disposition unless expressly made necessary. By the M. W. P. A., acknowledgment has (except as to a

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trust estate) ceased to be required in the case of women married after 1882, and in the case of property acquired by married women after 1882 without regard to the date of marriage.

The only case in which the concurrence of the husband becomes necessary is where both the marriage and the settlement are before 1883, and the wife is not entitled for her separate use. Where she is so entitled, even though the legal estate for life be in the husband in right of the wife, still his concurrence is not necessary. He is a trustee for her. The equitable tenant for life is full tenant for life for the purposes of the Act (ss. 2 (5); 58 (1) (ix.)), and can pass the legal estate.

As to letting a married woman, equitable tenant for life, into possession, see *Re Bagot*, 1894, 1 Ch. 177.

Tenant for life, lunatic.

62. Where a tenant for life or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

In *Re Gaitskell*, 40 Ch. D. 416, the committee of a lunatic tenant in tail was authorized to take proceedings under this s. to sell his undivided shares to a co-owner of the other shares.

Person of unsound mind not so found.

A lunatic not found so by inquisition cannot dispose of his fee simple land, nor does the Act enable the disposal by him of land of which he is tenant for life; he must be so found, and his committee appointed, before S. L. A. powers can be exercised on his behalf: *Re Baggs*, 1894, 2 Ch. 416; but, under ss. 116, 120, 128 of the Lunacy Act, 1890, a receiver can be empowered to exercise, on behalf of a person of unsound mind, not so found, powers given to the latter by a settlement: *Re X.*, *ib.* 415; and under s. 120 (*h*) the exercise of the statutory powers of leasing can also be authorized: *Re Salt*, 1896, 1 Ch. 117.

Lunatic infant.

If the lunatic be an infant, ss. 59 & 60 apply, as the ordinary jurisdiction in case of infants is not ousted unless there be a commission of lunacy: *Beall* v. *Smith*, 9 Ch. Ap. 85, 92; *Re Edwards*, 10 Ch. D. 605.

Married woman.

In the case of a married woman, where her husband, who has an estate in her right, and whose concurrence is necessary under s. 61 (3), is a lunatic, the powers of the Act, other than the powers of leasing, cannot be exercised unless under a commission; but if the married woman is entitled for her separate use, or as a *feme sole*, then she alone can

exercise the powers of the Act (s. 61 (2)), and in any case if she is an infant, ss. 59 and 60 apply.

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INFANTS; MARRIED WOMEN; LUNATICS.

In the case of a lunatic, as well as of any other tenant for life, notice under s. 45 must be served upon the trustees, and if necessary, trustees must be appointed for the purposes of the Act: *Re Taylor*, 31 W. R. 596; W. N., 1883, 95.

Notice under s. 45 in case of lunatic.

An order in lunacy is necessary to enable the committee to give the notice required by s. 45: *Re Ray's S. E.*, 25 Ch. D. 464.

The Lords Justices as additional Judges of the Chancery Division can make an order under s. 36, *sup.*: *Re Blake*, W. N., 1895, 51.

Covenants for title.

A committee selling under this s. can, on behalf of the lunatic enter into all usual and proper covenants, including covenants for title: *Re Ray*, 1896, 1 Ch. 468.

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision for case of trust to sell and re-invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the

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SETTLEMENT BY WAY OF TRUSTS FOR SALE.

settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

Compare s. 58 (1) (ix.).

Infant entitled at twenty-one with trust for maintenance.

Where a testatrix appointed real estate to trustees, upon trust to sell and invest, and to use so much of the annual income as should be required for the maintenance and education of her son and daughter (who were both infants), and to accumulate the remainder of the income, and, when her son should attain twenty-one, to pay him one moiety of the principal money and interest, and to pay to her daughter the other moiety when she should attain that age or marry, it was held that the infants were tenants for life under this s. of the Act: *Re Powell*, W. N., 1884, 67; and see *Re Horne*, 39 Ch. D. 84, where there was a discretionary trust for maintenance of children, with directions for accumulation, for the benefit of children attaining twenty-one, and so not necessarily for those children who were taking the income: and it was accordingly held in the Court of Appeal that they were not tenants for life within this s.

The tenant for life of the proceeds of sale of real estate is entitled to the rents and profits until sale, though the settlement contains no direction with respect thereto, and is consequently a tenant for life within this s.: *Re Searle*, 1900, 2 Ch. 829.

The trust or direction for sale under this subs. must be for immediate sale: *Re Horne, ubi sup.*; but see as to a future trust, S. L. A., 1890, s. 16 (2). A devise to trustees, followed by a direction to pay debts, creates only a power to sell, not a trust within this s.; see, however, *Re McCurdy's S. E.*, 27 L. R. Ir. 395, cited on s. 2 (8), *sup.*

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be

deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

Capital money under this Act.

Where land has been bought under a power in a money settlement (*e.g.* a power to buy a residence, or to invest in purchase of land), and is subject to a trust for re-sale, it is conceived that capital money arising from a sale of the land under this s., and s. 7 of the S. L. A., 1884, or from the exercise in relation to the land of any other power given by the S. L. A.'s (as in *Re Ridge*, 31 Ch. D. 504, cited on subs. (iv.), *inf.*), would be applicable as capital money under those Acts, if a case for such application arose; and any other money held on the trusts of the settlement and subject to the same power would be so applicable, under s. 33, *sup.*

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have

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SETTLEMENT BY WAY OF TRUSTS FOR SALE.

gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

Amendment by S. L. A., 1884, s. 6.

The effect of this s. was to prevent trustees for sale selling without the consent of persons who might be tenants for life of the proceeds of sale. This difficulty has been removed by the S. L. A., 1884, s. 6 (1), *inf.*

Prior to that Act, the Court in determining whether land vested in trustees on an absolute trust for sale was subject to the provisions of this s. looked simply at the instrument which originally created the trust, and if under that instrument there was no tenant for life within this s. the trustees could sell without the consent of any other persons: *Re Earle and Webster*, 24 Ch. D. 144.

As to a tenant for life under this s. being let into possession: see *Re Bagot*, 1894, 1 Ch. 177.

The provisions of s. 11, as to setting apart three-fourths of the rent under a mining lease, where the tenant for life is impeachable for waste, were applied to a lease of unopened mines under this s. by a tenant for life of proceeds of sale: *Re Ridge*, 31 Ch. D. 504; but where the trustees have power to open and work mines s. 11 has no application: *Re Bagot, sup.*

REPEALS.

XVI.—REPEALS.

Repeal of enactments in schedule.

64.—(1.) *The enactments described in the schedule to this Act are hereby repealed.*

(2.) *The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder*

before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

SS. 64, 65.

REPEALS.

This s. was repealed by the Statute Law Revision Act, 1898.

The only parts of Lord Cranworth's Act (23 & 24 Vict. c. 145) here repealed which are not re-enacted, are the provisions for the renewal of leases and for raising money for renewals. But those provisions were re-enacted by T. A., 1888, ss. 10, 11, and subsequently by T. A., s. 19.

The partial repeal of the Improvement of Land Act, 1864, renders it much easier to borrow under that Act for improvements. This Act does not enable borrowing for that purpose; but compare the Universities and College Estates Act, 1898.

XVII.—IRELAND.

IRELAND.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

See s. 16 (iii.).

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made

40 & 41 Vict. c. 57.

S. 65.

IRELAND.

accordingly, *at any time after the passing of this Act, to take effect on or after the commencement of this Act.*

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict. c. 56.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made *at any time after the passing of this Act, to take effect on or after the commencement of this Act,* in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

The words in italics were repealed by the Statute Law Revision Act, 1898.

THE SCHEDULE.

Section 64.

(*Repealed by the Statute Law Revision Act*, 1898.)

REPEALS.

23 & 24 Vict. c. 145, in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,—
	PARTS I. AND IV.	
	(being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881) (*a*).	
27 & 28 Vict. c. 114, in part.	The Improvement of Land Act, 1864	in part; namely,—
	Sections seventeen and eighteen:	
	Section twenty-one, from "either by a party" to "benefice or" (inclusive); and from "or if the land owner" to "minor or minors" inclusive); and "or circumstance" (twice):	
	Except as regards Scotland.	
40 & 41 Vict. c. 18, in part.	The Settled Estates Act, 1877,	in part; namely,—
	Section seventeen.	

NOTE.—S. 21 of the Improvement of Land Act, 1864, as it must now (except as to Scotland) be read, is as follows:—

Improvement of Land Act, 1864, s. 21, as altered by S. L. A.

21. If and when any Dissent from any such Application to the Commissioners for their Sanction of proposed Improvements shall have been notified in Writing to the Commissioners, by the Commissioners, Trustees, Company, or other Body or Individuals interested in any River or Canal which would or might be interfered with as hereinbefore mentioned, the Landowner desiring such Improvements may

In case of dissent, or when landowner's infant children are to be protected, Court of Chancery or

(*a*) But ss. 8 and 9 of 23 and 24 Vict. c. 145, have been in part re-enacted by T. A., s. 19, *sup.*

Session may authorize Commissioners to proceed.

apply to the High Court of Chancery in *England* or *Ireland* where such Lands are situate in *England* or *Ireland* respectively, or to the Court of Session where such lands are situate in *Scotland*, for an Order of such Court authorizing the Commissioners to entertain and proceed upon the Application for such proposed Improvements notwithstanding such Dissent; and such Application shall be made, as to Lands in *England*, to the Master of the Rolls or any one of the Vice Chancellors sitting at Chambers, by Summons, calling on the Party dissenting to show Cause why such Order should not be made; as to Lands in *Ireland*, to the Master of the Rolls, by summary petition or otherwise, as he shall by any General Order direct; and as to Lands in *Scotland*, to either Division of the Court of Session in Time of Session, or to the Lord Ordinary sitting on Bills in Time of Vacation, by summary Petition; and the Court or single Judge, as the Case may be, to whom such Application shall be made, shall hear and determine such Application, and for that Purpose shall have Power to make or direct to be made all such Inquiries, and receive and entertain all such Statements and Evidence, on Oath or by Affidavit, as such Court or Judge may consider necessary or desirable, or as may be produced before them or him; and if upon a Consideration of all the Circumstances such Court or Judge shall be of opinion that the Commissioners should entertain and proceed upon such Application, an Order shall be made authorizing and requiring them to proceed thereon, and to deal with the same according to the Provisions of this Act authorizing them in that Behalf, notwithstanding such Dissent as aforesaid: Provided that if at any Time after Notification of such Dissent, and before any such Order shall have been applied for and made aforesaid, such Dissent shall be withdrawn by a like Notification in Writing, it shall not be necessary to make or proceed with such Application, or to obtain such Order.

CHAPTER III.

THE SETTLED LAND ACT, 1884.
47 & 48 VICT. c. 18.

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2, 3, 4, 5.

1. This Act may be cited as the Settled Land Act, 1884.

Short title.

2. The expression "The Act of 1882" used in this Act means the Settled Land Act, 1882.

Interpretation.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

Construction of Act.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

Fine on a lease to be capital money.

As to fines, see S. L. A., s. 7 (2) and n.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

The notice required by s. 45 of the S. L. A., is now, by s. 7 (i.) of S. L. A., 1890, dispensed with in the case of certain leases.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars

SS. 5, 6.

and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

Notice as to mortgages.

Subs. 1 only applies to the case of a sale, exchange, partition, or lease. Specific notice within the meaning of *Re Ray's S. E.*, 25 Ch. D. 464, is still necessary as to a mortgage or charge. Sale includes an enfranchisement within S. L. A., 1882, s. 3 (ii.).

Particulars and information.

Under s. 44 of the Act of 1882, a trustee can apply to the Court for any particulars or information, and a tenant for life improperly refusing would be liable to costs. The cost of furnishing particulars and information being costs of the trust will be payable out of capital.

Waiver.

Under subs. 3 the waiver or acceptance to be complete must be by all the trustees, if more than one, and will include the required notice to the solicitor of the trustees, which is merely a secondary notice to the trustees.

As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of only one of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of

any power conferred by the settlement exerciseable for any purpose provided for in that Act.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Subs. 1 applies only to the case of land held on trust for sale dealt with by s. 63 of the Act of 1882, and if there be no order under s. 7 of this Act the trustees can now perform the trusts in the same manner as before the Act of 1882.

By subs. 2 the object of s. 56 (2) of the Act of 1882 is attained by making the consent of one only of two or more persons who together constitute the tenant for life sufficient. As to this expression see S. L. A., s. 2 (6) and n. thereto, also *Re Osborne & Bright's, Ltd.*, 1902, 1 Ch. 335, where it was held that tenants for life of undivided shares *separately* settled by the same instrument do *not* together constitute the tenant for life, and that the consent of all was necessary.

Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may, by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

S. 7.

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

The result of this s. is that:—

(1.) The tenant for life must, before exercising a power under s. 63, obtain leave of the Court, and after leave given, the trustees are not to exercise any power to which the leave extends. This will prevent concurrent conflicting powers. The leave will be obtained on summons.

(2.) The order giving leave will be registered as a lis pendens. If a purchaser does not find any lis pendens registered he will know that the trustees are free to deal.

(3.) The lis pendens will be registered against the trustees, as "Trustees for the purposes of the S. L. A., 1882," so that the nature of the order is shown, and the registration will not affect them in their dealings with their own property.

(4.) The order will also describe the person to whom leave is given

as being tenant for life, which is made conclusive as to his having that character, and absolves a purchaser from inquiring into the trusts affecting the sale money. In this way the title to the money will not come on the title to the land.

A tenant for life does not in general (but see S. L. A., ss. 4, 17) require the powers conferred by s. 63 of the Act of 1882. That s. was required to prevent settlements being made by way of trust for sale to evade the preceding part of the Act.

For orders under this s. see *Re Houghton Estate*, 30 Ch. D. 102; *Backhouse* v. *Eckroyd*, Seton, 6th ed., 1831; *Re Harding's Estate*, 1891, 1 Ch. 60 (which latter case deals with the powers of the Court, under this s., where an order has been already made in an action, giving the trustees leave to sell); *Re Bagot*, 1894, 1 Ch. 177 (where the tenant for life was a married woman); *Re Searle*, 1900, 2 Ch. 829. The Court, in the exercise of its discretion under this s., refused to empower a tenant for life to grant a building lease, under which the lessee was to do repairs which the Court thought the tenant for life ought to execute: *Re Daniell's S. E.*, 1894, 3 Ch. 503.

Power to lease.

As to the power under S. E. A. for the tenant for life of the proceeds of sale to lease for 21 years where no power to lease is conferred on the trustees, see S. E. A., s. 46; *Re Laing*, 1 Eq. 416.

Bonus to tenant for life under Irish Land Acts, 1903 & 1904.

In *Re Iever's Settlements*, 1904, 1 Ir. R. 492, it was held that the Court would not refuse leave to a tenant for life within s. 63 of the Iever's Act of 1882, to carry out a sale to his tenants under the Irish Land Acts merely because the bonus under the Irish Land Act, 1903, s. 48, would be paid to the tenant for life as his absolute property under s. 3 of the Irish Land Act, 1904.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

See note to S. L. A., s. 58 (1) (viii.).

In applying to the Court under this s. the title of the proceedings will be, "In the matter of, &c., settled by a settlement deemed to be existing under the S. L. A.'s, 1882 and 1884, and made by A. B., deceased, the late wife of C. B." The date must necessarily be omitted. See Form 1, Chap. VIII. *inf.*; *Re Wells*, Seton, 5th ed., 1512.

CHAPTER IV.

THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887. 50 & 51 VICT. c. 30.

An Act to amend the Settled Land Act (1882).

[23rd August, 1887.]

45 & 46 Vict. c. 38.

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorized:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

S. 1.

Amendment of s. 21 of the S. L. A., 1882.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

This Act was consequent on the decision in *Re Knatchbull*, 27 Ch. D. 349; 29 *ib.* 588.

It has been held that capital must not be applied in payment of any portions of an instalment which represent interest: *Re Lord Sudeley's S. E.*, 37 Ch. D. 123; but the Court of Appeal, in *Re Lord Egmont's S. E.*, 45 Ch. D. 395 (where capital was allowed to be paid, by way of

bonus, to the mortgagees, in addition to their principal, to induce them to be redeemed), thought this construction of the Statute too narrow.

An investment, before this Act, of capital moneys in the purchase of terminable rent-charges, created under the Improvement of Land Act, 1864, is not money "expended in redeeming" the same under this s.: *Re Howard's S. E.*, 1892, 2 Ch. 233; nor is a payment made by a tenant for life in order to obtain a reduction in the rate of interest: *Re Verney's S. E.*, 1898, 1 Ch. 508. This s. applies to improvements executed before and after the Act, but not to payments made before the Act: see *Re Howard's S. E.*, *sup.*, at p. 242. An order for payment of instalments of rent-charge, so far as they remained unpaid after the Act, can be made, although the improved estate has been sold: see S. C., pp. 243–4; but such instalments will be paid only from the time when the tenant for life requires payment under this s.: see S. C., p. 244; *Re Dalison's S. E.*, 1892, 3 Ch. 522; *Re Marq. of Bristol's S. E.*, 1893, 3 Ch. 161, 165. A prospective order relating to capital money not in hand will not be made: S. C.

See also, on this s., *Ex p. Vicar of Castle Bytham*, 1895, 1 Ch. 348.

And as to what improvements are within this s., see *Re Newton's S. E.*, W. N. 1889, 201; 1890, 24.

Improvements mentioned in s. 13 of the Act of 1890 are within this s. (see s. 2 of that Act); which will accordingly apply to a rent-charge under the Limited Owners' Residences Act, 1870, to the extent to which S. L. A., 1890, s. 13, allows capital money to be applied.

Section 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

See *Re Howard's S. E.*, 1892, 2 Ch. 233, 241–2.

Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

CHAPTER V.

THE SETTLED LAND ACT, 1889.
52 & 53 VICT. c. 36.

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2, 3.

Construction and short title.

1. This Act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Option of purchase in building lease, 45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years purchase of the highest rent reserved by the lease or agreement.

See S. L. A., s. 2 (10.) (iii.) and n. thereto and ss. 6, 7, 8, 31; and compare *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236. And as to the option being limited as to time, see *Woodall* v. *Clifton*, W. N., 1905, 99. The term must be legally assigned to pass the option: *Friary &c.* v. *Singleton*, 1899, 1 Ch. 86; reversed on the facts, 1899, 2 Ch. 261.

Price to be capital money.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

CHAPTER VI.

THE SETTLED LAND ACT, 1890.
53 & 54 VICT. c. 69.

An Act to amend the Settled Land Acts, 1882 *to* 1889.
[18th August, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

SS. 1, 2, 3, 4.

1. This Act may be cited as the Settled Land Act, 1890.

Short title.

2. The Settled Land Acts, 1882 to 1889, and this Act are to be read and construed together as one Act, and may be cited as the Settled Land Acts, 1882 to 1890.

Acts to be construed together.

3. Expressions used in this Act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Interpretation.

Definitions.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

Instrument in consideration of marriage, &c., to be part of the settlement.

45 & 46 Vict. c. 38.

SS. 4, 5, 6, 7.

Definitions.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

The object of this s. was to exclude the operation of s. 50 of the S. L. A. It does not render necessary the appointment of trustees of the "compound settlement" constituted by the original settlement, and the instrument effecting the assignment or charge: *Re Du Cane & Nettlefold*, 1898, 2 Ch. 96. And see n. to S. L. A., s. 2 (1), "Compound Settlement."

Exchanges.

Creation of easements on exchange or partition.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

See S. L. A., s. 3 (iii.), (iv.); s. 17.

This s. authorizes an exchange of easements, apart from any exchange or partition of land: *Re Bracken's Settlement*, 1903, 1 Ch. 265.

Completion of Contracts.

Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

See S. L. A., s. 31; this Act by this s. extends the powers given by that s. to the case of contracts having priority to the settlement. North, J., has said that this s. does not apply to leases: *Re Kemeys-Tynte*, 1892, 2 Ch. 211, 213; but S. L. A., s. 20 (1), applies the word "convey" to a lease. S. L. A., s. 12 (i.), however, makes special provision for contracts for leases.

Leases.

Provision as to leases for 21 years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from

punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

45 & 46 Vict. c. 38.

See S. L. A., ss. 6, 7, 45, and s. 10, *inf.*

As to exemption from punishment for waste, within this s., see *Davies* v. *D.*, 38 Ch. D. 499 (a decision on the S. E. A., s. 46).

Provision as to mining leases.

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

See S. L. A., ss. 6, 7, 9.

Power to reserve a rent-charge on a grant in fee simple.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rent-charge, the reservation shall operate to create a rent-charge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rent-charge so created shall go and

44 & 45 Vict. c. 41.

SS. 9, 10.

Leases.

remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

See S. L. A., ss. 2 (10), (i.) (iii.), 10, 24, and n. to C. A., s. 44.

The words "yielding and paying," or the like words, are sufficient to reserve a rent-charge, so that it may take effect under the Statute of Uses: *Cromwel's Case*, 2 Co. 69 b.; Sanders on Uses, 5th ed., 276; Co. Lit. 213 b., *et seq.*

Mansion and Park.

Restriction on sale of mansion.

Mansion and Park.

10.—(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion-house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

Order of Court.

For the principles on which the Court makes or refuses the order, see *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 546; 1892, A. C. 356; *Re Wortham's S. E.*, 75 L. T. 293.

(3.) Where a house is usually occupied as a farm-house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion-house within the meaning of this section.

Easements over park.

This s. applies to a lease of easements over the park, &c.: *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Pease* v. *Courtney*, 1904, 2 Ch. 503.

"Park."

Park, as used in this s., is not confined to an ancient legal park, but includes an ordinary private park: *Pease* v. *Courtney*, *sup.*

"Usually occupied therewith."

The words "usually occupied therewith" refer merely to the words "lands (if any)" immediately preceding them. Accordingly the s. may apply to a park *not* usually occupied with the principal mansion-house: *Pease* v. *Courtney*, *sup.*

For a case of one mansion-house, with lands in different counties, distant from each other, see *Re Thompson*, 21 L. R. Ir. 109.

Mansion and Park.

As to the circumstances under which the Court will, under the S. E. A., authorize a sale of the mansion-house where the tenant for life is an infant, though a remainderman objects, see *Marquis of Camden* v. *Murray*, 27 Sol. J. 652.

Land in different counties.

The fact that the mansion is expressly excepted from the power of sale given by the settlement will not prevent the Court from authorizing a sale: *Re Brown's Will*, 27 Ch. D. 179.

Sale of mansion, remainderman objecting.

The consent of the mortgagee of the estate for life is of course necessary: S. L. A., s. 50 (3): *Re Sebright*, 33 Ch. D. 429.

Effect of express exception.

All future settlements should contain, as authorized by S. L. A., s. 57, an express provision removing the restriction imposed by S. L. A., 1890, s. 10, and, where still necessary, defining the house and land to which it applies.

Mortgagee's consent.

Provision in future as to mansion, &c.

For form of summons for leasing under this s., see Forms IV. and V.; and for sale, Forms VI. and VII., Chap. VIII., *inf.*; and as to service of the summons, r. 4, *ib.*; and for Forms of Orders, Seton, 6th ed., 1830, 1833, 1834.

The Raising of Money.

The Raising of Money.

11.—(1). Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

Power to raise money by mortgage.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

As to the meaning of "required," see *Re Clifford*, 1902, 1 Ch. 87.

"Required."

Where the transaction is wholly or partly a new mortgage to secure an existing debt which is transferred, and there is no money to be paid to the trustees, still it is conceived the trustees must be parties to the mortgage and direct payment by the mortgagee to the transferor; and see S. L. A., s. 45. Where the trustees give a receipt for, or direct payment of, the money, the mortgagee is not concerned to see that the

Trustees should be parties to mortgage.

SS. 11, 12.

The Raising of Money.

money is wanted: S. L. A., s. 40; as to raising money for costs, see *ib.*, s. 47.

This s. applies to all incumbrances, whether prior to the settlement or not, and whether raised or not raised.

"Incumbrance."

Public Health Act, 1875.

Estate Duty.

Land tax.

Agricultural Holdings Acts.

A tenant for life may raise money by mortgage under this s. for the purpose of discharging expenses charged on the settled land by s. 257 of the Public Health Act, 1875: *Re Smith's S. E.*, 1901, 1 Ch. 689. Also to repay himself sums paid for Estate Duty under the Finance Act, 1894; or for redemption of land tax under the Finance Act, 1896; or sums expended in respect of any improvements mentioned in the first or second parts of the First Schedule to the Agricultural Holdings Act, 1900, and for the repayment of which he has obtained a charge under the Agricultural Holdings (England) Act, 1883, s. 29, as modified by s. 3 of the Act of 1900.

S. L. A., s. 53.

The tenant for life will be restrained from mortgaging a part of the settled land not already mortgaged, if the mortgage is injurious to the interests of others claiming under the settlement: *Hampden* v. *Earl of Buckinghamshire*, 1893, 2 Ch. 531; compare *Re Lord Monson's S. E.*, 1898, 1 Ch. 427.

And as to the powers, apart from this Act, of a tenant for life to deal with mortgages on the settled land, see *More* v. *M.*, 37 W. R., 414.

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

Dealings as between Tenant for Life and the Estate.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Apart from this s. a tenant for life whose consent is necessary to the exercise of a power of sale by trustees may purchase from the trustees: *Dicconson* v. *Talbot*, 6 Ch. 32.

The s. only applies to sales, enfranchisements, exchanges and partitions.

S. 13.

Application of Capital Money.

Application of Capital Money.

13. Improvements authorized by the Act of 1882 shall include the following; namely,

Application of capital money.

(i.) Bridges;

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion-house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

Improvements.

As to what improvements are, or are not, authorized under this s. & S. L. A., s. 25, see note to that s., *sup.*

Additions or alterations.

As to what is an "addition to or alteration in buildings," see *Re Gaskell's S. E.*, 1894, 1 Ch. 485; *Stanford* v. *Roberts*, 1901, 1 Ch. 440; *Re Clarke's Settlement*, 1902, 2 Ch. 327; *Re Blagrave's S. E.*, 1903, 1 Ch. 560 (not following *Re Freake's Settlement*, 1902, 1 Ch. 97); *Standing* v. *Gray*, 1903, 1 Ir. R. 49; *Re Leveson-Gower's S. E.*, W. N., 1905, 87; 53 W. R. 524; 1905, 2 Ch. 95.

"Reasonably necessary and proper;" see these words considered in *Stanford* v. *Roberts*, *sup.*

Present intention to let.

There must be a present intention to let, as distinguished from an intention to occupy, to be within subs. (ii.): *Re De Teissier's S. E.*, 1893, 1 Ch. 153; *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252, 260, 264, 267; *Re Lord De Tabley*, 75 L. T. 328; *Stanford* v. *Roberts*, *sup.*, or the tenant must have given notice to quit unless certain works coming within the subs. were done, and it would be difficult or impossible to relet without doing the works: *Re Calverley's S. E.*, 1904, 1 Ch. 150.

"Rebuilding."

"Rebuilding," in subs. (iv.), does not include structural repairs: *Re De Teissier's S.E.*, *sup.* What is rebuilding is a question of fact in each particular case: *Re Wright's S. E.*, 83 L. T., 159; but the alteration, enlargement, and reconstruction of a mansion may be

SS. 13, 14, 15.

Application of Capital Money.

within the subs., though part of the mansion-house is left intact, or some of the walls are utilized: *Re Walker's S. E.*, 1894, 1 Ch. 189; and see *Re Legh's S. E.*, 1902, 2 Ch. 274; *Re Kensington S. E.*, 21 T. L. R., 351.

"Annual rental."

The income, arising from capital money, should be included when calculating the "annual rental": *Re De Teissier's S. E., sup.*; also the rents of all estates settled on the same limitations as that on which the mansion-house stands: *Re Lord Gerard's S. E., sup.*; also the rental value of a farm usually let, but for the time being unlet; but not the rental value of land in the occupation of the tenant for life: *Re Walker's S. E., sup.* There are no deductions to be made for incumbrances, &c., as under s. 4 of the Limited Owners' Residences Act, 1870, nor ought the cost of repairs to be deducted: *Re Kensington S. E., sup.*

General jurisdiction.

As to the general jurisdiction of the Court in authorizing repairs and improvements, see the first note to S. L. A., s. 25, *sup.*

For further powers as to erection of a mansion-house, see the Limited Owners' Residences Acts, 33 & 34 Vict. c. 56; and 34 & 35 Vict. c. 84.

Capital money in Court may be paid out to trustees.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

This s. meets the decision in *Cookes* v. *C.*, 34 Ch. D. 498; and see S. L. A., s. 21 (ix.), n., s. 22; compare s. 55 (1).

Court may order payment for improvements executed.

15. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

See S. L. A., s. 26, and note thereto.

Under this s., capital money will be applied in recouping to a tenant for life the cost of improvements executed since 1882: *Re Ormrod's S. E.*, 1892, 2 Ch. 318. As to how the jurisdiction of the Court to reimburse the tenant for life will be exercised, see *Re Tucker's S. E.*, 1895, 2 Ch. 468; *Cardigan* v. *Curzon-Howe*, 9 T. L. R. 244; *Re Partington*, 1902, 1 Ch. 711; in all of which cases an order was refused. Orders were made in *Re Earl of Egmont's S. E.*, 44 Sol. J. 428 (where the improvements were not among those mentioned in the

Acts, but being authorized by the settlement, were brought within the Acts by S. L. A., s. 57 (2)); *Re Earl of Lisburne's S. E.*, W. N., 1901, 91 (where the trustees would have approved a scheme, if there had been capital money in hand—as to which see *Re Duke of Norfolk's Parly. Estates*, 1900, 1 Ch. 461); and compare *Re Thomas*, 1900, 1 Ch. 319 (where the money had been expended by the trustees, and not by the tenant for life). The Court will not usually make the order as regards improvements executed before 1883: *Re Ormrod's S. E.*; nor direct repayment of instalments of a rent-charge, paid by a tenant for life before the date at which he has required redemption under the S. L. A., 1887: *Re Dalison's S. E.*, 1892, 3 Ch. 522; *Re Howard's S. E.*, 1892, 2 Ch. 233; nor make a prospective order directing future capital moneys to be applied in payment of costs of improvements executed, or in repayment of moneys paid, or to be paid, in keeping down charges created to raise money for improvements: *Re Marquis of Bristol's S. E.*, 1893, 3 Ch. 161; see also *Re Millard's S. E. ib.* 116.

SS. 15, 16.

Application of Capital Money.

Trustees.

Trustees.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

Trustees for the purposes of the Act.

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

See S. L. A., s. 2 (8).

Where a testator devised an estate to his wife and another upon trust for his wife for life, and after her death upon trust for sale, it

SS. 16, 17, 18.

Trustees.

was held that on a sale by the wife as tenant for life, she and her co-trustee were trustees under subs. ii. : *Re Jackson's S. E.*, 1902, 1 Ch. 258.

"Of the land to be sold"—see 34 Sol. J. 812, where it is suggested that the trustees cannot act for any of the purposes of the Acts except sale and re-investment of the purchase-money, but it is understood that it has been held in Chambers (Kekewich, J., 7 August, 1899), that this view is incorrect.

Once trustees always trustees, *qu.*

Where there have been trustees with a power to sell part of the settled land but that land has been sold, the same persons it is conceived remain S. L. A. trustees for the purposes of other land remaining settled. If the words, "who are for the time being," are held to refer to the date of the intended dealing or disposition, then it may be necessary to resort to S. L. A., s. 38.

For the purposes of subs. (i.) the power of or trust for sale must, it seems, be immediate.

Application of provisions of 44 & 45 Vict. c. 41, as to appointment of trustees.

17.—(1.) *All the powers and provisions contained in the Conveyancing and Law of Property Act,* 1881, *with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts,* 1882 *to* 1890, *whether appointed by the Court or by the settlement, or under provisions contained in the settlement.*

(2.) *This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the passing of this Act.*

(3.) *This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act otherwise than under the provisions of the Conveyancing and Law of Property Act,* 1881.

This s. is repealed and in effect replaced by T. A., s. 47, *sup.*

Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings

of a rateable value not exceeding one hundred pounds per annum.

See Chap. VII., *inf.*

Power to vacate registration of writ.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any Judge thereof.

See Land Charges Registration and Searches Act, 1888, s. 5 (4), n., *sup.*

CHAPTER VII.

THE HOUSING OF THE WORKING CLASSES ACT, 1890. (53 & 54 VICT. c. 70), s. 74, SUBS. (1).

[18th August, 1890.]

Amendment of 45 & 46 Vict. c. 38.

74.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

(*a*) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

(*b*) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artisans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

This s. is a re-enactment of s. 11 of the Housing of the Working Classes Act, 1885, which Act is repealed (except as to a small part, not including s. 11) by s. 102 of this Act.

The last clause of the s. seems to imply that in every case where new buildings are to be erected the opinion of the Court must be obtained that the expenditure is not injurious to the estate; at least, it will not be prudent for trustees to omit to do so; but dwellings available for the working classes can be "reconstructed, enlarged, or improved" under S. L. A., s. 25 (xx.), although the approval of the Court was not obtained to their being built in the first instance: *Re Calverley's S. E.*, 1904, 1 Ch. 150. Dwellings suitable for the working classes, but occupied at the time by persons not members of those classes, are not "available for the working classes" within subs. (*b*): S. C.

Old buildings.

"Available."

CHAPTER VIII.

THE SETTLED LAND ACT RULES, 1882.

December, 1882.

1. THE expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

[NOTE.—Costs of a petition were allowed in *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541; *Re Arnold*, 31 Sol. J. 560; *Ex parte Jesus College*, 50 L. T. 583; and *Re Earl de Grey*, W. N., 1887, 241. It is understood that this r. applies to an application for payment out of Court, to S. L. A. trustees, of a fund exceeding £1000.]

Cost of petition.

Fund exceeding £1000.

3. The forms in the Appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to the Form I. in the Appendix.

[NOTE.—Form ii. now needs some modification to meet the existing R. S. C.: see note to that Form, *inf.*]

4. The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

[NOTE.—S. 15 is now repealed, and, in the main, re-enacted by S. L. A., 1890, s. 10.]

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

Time for application.

[NOTES.—The proper time for an application under this rule in regard to the appointment of new trustees, is after a summons for their appointment has been taken out; but where an action had been commenced and an injunction obtained to restrain an intended sale by the tenant for life until trustees for the purposes of the Act had been appointed, an order as to the service of notice of the summons was made before the summons was taken out: *Wheelwright* v. *Walker*, 23 Ch. D. 763.

Service dispensed with.

Service on the children of the tenant for life was dispensed with where the Court deemed their interests sufficiently represented by the trustees, who had been served: *Re Brown*, 27 Ch. D. 180.

And see, on this and the two preceding rr., *Re Marq. of Ailesbury*, S. E., 42 W. R. 45.]

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and

trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorized or directed by the Court under the Act, shall be carried into effect out of Court, unless the judge shall otherwise order, and generally in such a manner as the judge may direct.

9. Where the Court authorizes generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorizes any such lease or grant in any particular case, or where the Court authorizes a lease under section 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

[NOTE.—As to leases under s. 15 see now S. L. A., 1890, s. 10]

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms IX., X., and XI.)

11. The summons shall be supported by an affidavit setting forth:—

(1) The name and address of the person desiring to make the payment.

(2) The place where he is to be served with notice of any proceeding relating to the money.

(3) The amount of money to be paid into Court and the account to the credit of which it is to be placed.

(4) The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.

(5) The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court may contain directions for investment of the money

on any securities authorized by section 21, sub-section 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.)

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

[NOTE.—It is submitted that this rule, 14, is *ultra vires*. The whole purchase-money must under the Act be paid to the trustees and a receipt given or it must be paid into Court, otherwise the estate will not pass by the conveyance. This is the old rule in case of an exercise of an ordinary power (*Cockerell* v. *Cholmeley*, 1 Clarke & Fin. 60) and must apply to a sale under this Act: see also D. C. F., 5th ed., p. 1234, n. (*c*), and, as to the old practice, *Christian* v. *Chambers*, 4 Hare, 307. However, in *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531, the order was (p. 540) that purchaser deduct costs of summons out of the fund before paying it in: and see Seton, 6th ed., 1830 (No. 6); S. L. A., s. 21 ("subject to payment of claims properly payable thereout") s. 46 (6); s. 47. When the whole money has been paid to the trustees or into Court, any costs properly payable can then be paid.]

15. In all cases not provided for by the Act or these rules, the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the

time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

As to County Courts, see County Court Rules, 1903, O. 38.

As to the Palatine Court of Lancaster, see the S. L. A., Chancery of Lancashire Rules, 1883.

As to Ireland, see R. S. C., Ireland, 1891, O. 72.

APPENDIX. (1)

Form I.

Title of Proceedings. (2)

In the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]

In the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the Will of dated *or as the case may be*].

And in the matter of the Settled Land Act, 1882.

Form II.

Formal Part of Summons. (3)

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of , 18 , at o'clock in the forenoon, on the hearing of an application

(*a.*) On the part of *A. B.*, the tenant for life [*or*, tenant in tail, *or*

---

(1) The Appendix referred to in the preceding rules under S. L. A.

(2) See also D. C. F., 5th ed., No. 2327.

And, as to title of proceedings under the Act, where an action is pending for execution of trusts of the settlement, see *Re Parry*, W. N., 1884, 43.

(3) See now R. S. C., O. 54 r. 4 B., and D. C. F., 5th ed., No. 2328, and p. 1227, n. (*h*).

as the case may be, describing the nature of the applicant's estate] under the above-mentioned settlement.

Or, (*b.*) On the part of *A. B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement of an infant, by *X. Y.*, his testamentary guardian [*or*, guardian appointed by order dated the *or*, next friend].

Or, (*c.*) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of *G. H.*, the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (*e.*) On the part of *I. J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I. J.*, the lessee under a mining lease dated the , 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the land settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of , 18

This summons was taken out by of solicitor for the applicant.

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

Form III.

Summons under S. 10 for General Leasing Powers.

Title and formal parts as in Forms I. and II. (*a*) or (*b*).

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A. B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorized from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 to 9 of the said Act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

[*Note.*—The costs are directed to be taxed as between solicitor and client: see S. L. A., s. 46 (6).]

FORM IV.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

[NOTE.—S. 15 is now repealed, and, in the main, re-enacted by S. L. A., 1890, s. 10.]

FORM V.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion-house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act, be approved, and that the applicant [*or* the said *X. Y.*] may be authorized to execute the same.

2. (*Add application for costs as in Form III.* 2.)

[NOTE.—As to s. 15, see note to Form IV.]

Form VI.

Summons under SS. 15, 35, or 37, for a Sale out of Court of the Principal Mansion-House, and Demesnes, or of Timber or Chattels.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorized to sell the principal mansion-house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable, as in Form III.* 2.

[Note.—As to s. 15, see note to Form IV.]

Form VII.

Summons under SS. 15, 35, or 37, for Sale by the Court of the Principal Mansion-House, and Demesnes, or of Timber or Chattels.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the principal mansion-house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III.* 2.)

[Note.—As to s. 15, see note to Form IV.]

Form VIII.

Affidavit Verifying Title.

Title as in Form I.

I of make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in

possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is a fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.* of and *E. F.* of are Trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be Trustees thereof for purposes of the abovementioned Act].

FORM IX.

SUMMONS UNDER S. 22 BY PURCHASE FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (*e*).

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of the securities representing the same, as the Court may think proper.

FORM X.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* S. 11).

Title as in Form I.

Formal parts as in Form II. (*f*).

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement dated the and made between [*or* the will, &c.] mineral rents under lease dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into Court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into Court to the credit aforesaid, so

much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement during his life or until further order.

[NOTE.—As to deduction of costs of payment in, see note to r. 14, *sup.*]

FORM XI.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY MORTGAGEE (*see* S. 18).

Title as in Form I.

Formal parts as in Form II. (*g*).

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

[NOTE.—The directions for investment are in fact in Form IX. 2. As to deduction of costs, see note to Form X.]

FORM XII.

SUMMONS UNDER S. 26 (1).

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

Form XIII.

Summons under S. 26, Subs. (2) (ii.) for Appointment of an Engineer or Surveyor.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

Form XIV.

Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We *C. D.* of and *E. F.* of the Trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii.) of the said Act.

(Signed) *C. D.*
E. F.

Form XV.

Summons under S. 26, Subs. (2) (iii.).

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That *C. D.* and *E. F.*, the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III.* 2.)

[Note.—See now S. L. A., 1890, s. 15, as to dispensing with scheme.]

FORM XVI.

SUMMONS UNDER S. 26, SUBS. 3.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the sum of £ may be ordered to be raised out of the in Court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

[NOTE.—See note to Form XV.]

FORM XVII.

SUMMONS UNDER S. 31.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

SUMMONS UNDER S. 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II. (*a*), (*b*), or (*d*).

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest, describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the Court may think fit.

2. (*Add application for costs as in Form III.* 2.)

Form XIX.

Summons under S. 38 for the Appointment of New Trustees.

Title as in Form I.

Formal parts as in Form II. (*a*), (*b*), (*c*), or (*d*).

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.
2. (*Add application for costs as in Form III.* 2.)

Form XX.

Summons under S. 44.

Title as in Form I.

Formal parts as in Form II. (*a*), (*b*), or (*c*).

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

Form XXI.

Summons under S. 56 for Advice and Direction.

Title as in Form I.

Formal parts as in Form II. (*a*) to (*h*).

For the opinion, advice, and direction of the judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

Form XXII.

Summons under S. 60 for Appointment of Persons to exercise Powers on behalf of Infant.

Title as in Form I.

Formal parts as in Form II. (*b*).

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the

above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs as in Form III.* 2.)

[(1.) NOTE.—The settlement may be described as a "settlement deemed to be existing under the S. L. A., 1882:" *Re Wells*, Seton, 5th ed., p. 1512; D. C. F., 5th ed., No. 2327.]

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of , 18 .

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